APPENDIX

Senate Journal
65th Legislature, First Called Session
July 15, 1977

Actions and Papers Relative to the Address of the Governor of Texas for the Removal from Office of Donald B. Yarbrough Associate Justice Supreme Court of Texas

Table of Contents

Transcript of address proceedings of the Senate and House of Representatives sitting as a Committee of the Whole 167

House Concurrent Resolution No. 1 addressing the Governor of Texas to remove Donald B. Yarbrough from the Office of Associate Justice of the Supreme Court of Texas 184

Senate Concurrent Resolution No. 1 addressing the Governor of Texas to remove Donald B. Yarbrough from the office of Associate Justice of the Supreme Court of Texas 186

Letter from Speaker Bill Clayton to Donald B. Yarbrough notifying him of the impending action 187

House Concurrent Resolution No. 2 adopting procedures for a hearing 189

Copies of Subpoenas 194

Letter by Lieutenant Governor Hobby appointing Senator Ray Farabee Chairman of the Committee of the Whole Senate 206

Joint letter by Lieutenant Governor Hobby and Speaker Clayton appointing counsel for the proponents 206

Letter by Waggoner Carr and Donald Nobles demanding immediate hearing on all pre-hearing motions 207

Letter by Senator Ray Farabee setting time and place of hearing on pre-hearing motions 208

Letter by Senator Farabee changing place of hearing on pre-hearing motions 209

Transcript of pre-hearing conference 210

Response and pre-hearing motions by attorneys for respondent 245

Pre-hearing motions and arguments by proponents 258

Pre-hearing motion by Ronald Earle 271

Pre-hearing motion by attorney for Davis Grant 272

Statement of intent to resign by Donald B. Yarbrough 274

Letter by Donald B. Yarbrough to Governor Dolph Briscoe tendering resignation 275

Letter by Governor Dolph Briscoe to Senator Farabee advising receipt and acceptance of letter of resignation by Donald B. Yarbrough 276

Letter by Governor Dolph Briscoe to Secretary of State Mark White filing letter of resignation of Donald B. Yarbrough 277

Attorney General opinion on removing a judge in special session 278

Legislative Council memorandum on vote required for passage of address resolution 280

Legislative Council memorandum on secrecy surrounding grand jury proceedings 283

Original complaint for declaratory relief, temporary restraining order, preliminary and permanent injunction filed in the U.S. District Court, Western Division of Texas 286

Motion for temporary restraining order, U.S. District Court 290

Plaintiff's brief in support of request for injunctive relief, U.S. District Court 292

Plaintiff's supplemental brief in support of request for injunctive relief, U.S. District Court 296

Motion to dismiss by Attorney General of Texas, U.S. District Court 301

Defendant's memorandum in support of motion to dismiss, U.S. District Court 303

Order of dismissal, U.S. District Court 307

Letter by Robert E. Johnson regarding corrections to transcript of proceedings by Waggoner Carr 309

SENATE OF THE STATE OF TEXAS
HOUSE OF REPRESENTATIVES OF THE STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE

Legislature Sitting as a Committee of the Whole Jointly in the Chamber of the House of Representatives

Texas State Capitol
Austin, Texas
Convening July 15, 1977

ADDRESS PROCEEDINGS PERTAINING TO THE HONORABLE DONALD B. YARBROUGH

APPEARANCES:

Presiding Officer: Senator Ray Farabee, Chairman of the Committee of the Whole Senate

Chairman: Representative L. DeWitt Hale, Chairman of the Whole House of Representatives

Counsel for Proponent:

Chief Counsel: Honorable Robert "Bob" Maloney
Senate Counsel: Honorable Kent Hance
Senate Counsel: Honorable Gene Jones
Senate Counsel: Honorable Don Adams
House Counsel: Honorable Lynn Nabers
House Counsel: Honorable Ben Grant

Counsel for Respondent:

Chief Counsel: Honorable Waggoner Carr
Counsel: Donald F. Nobles
Counsel: Bob Blinderman
Counsel: Tom McCorkle

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Betty Denton
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Roy E. English
Charles W. Evans
Michael H. "Mike" Ezzell
Charles Finnell
Buck Florence
Milton E. Fox
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Matt Garcia
Frank Gaston
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R. E. "Gene" Green
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Frank Hartung
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Luther Jones
James J. Kaster
Bill Keese
Dan Kubiak
Lance Lalor
James E. "Pete" Laney
Herman Lauhoff
George "Mickey" Leland
Gibson "Gib" Lewis
Cullen R. Looney
Frank Madla
Robert "Bob" Maloney
Jimmy Mankins
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Don Rains
Irma Rangel
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Abraham D. Ribak
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Jim Rudd
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Tom Schieffer
Stan Schlueter
Chris Victor Semos
Robert "Bob" Simpson
Richard C. Slack
Carlyle Smith
Clay Smothers
David Stubbeman
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Lou Nelle Sutton
Arthur "Buddy" Temple
Frank Tejeda
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D. R. "Tom" Uher
Chase Untermeyer
R. L. "Bob" Vale
Robert Valles
Tim Von Dohlen
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LeRoy J. Wieting
Doyle Willis
John Wilson
Ron Wilson
Brad Wright
Joe Wyatt

MORNING SESSION

July 15, 1977

CHAIRMAN HALE: The Committee of the Whole House will come to order. Will you please clear the aisles and get a little order to the Chamber? If there are any persons on the floor or Chambers who are not entitled to be here under the rules adopted by the current resolution, would you please retire from the Chamber? All members of the Committee of the Whole House who are present will please register on the voting machines.

(Roll Call of Committee of Whole House printed in House Journal of July 15, 1977)

CHAIRMAN HALE: Show Mr. Clayton present. A quorum of the Committee of the Whole House is present.

PRESIDING OFFICER FARABEE: The Committee of the Whole Senate will come to order.

We are convened in accordance with **H.C.R. 2**; I will ask the Secretary of the Senate to call the roll.

The roll was called and the following Senators were present: Hobby, Adams, Aikin, Andujar, Braecklein, Brooks, Clower, Creighton, Doggett, Farabee, Hance, Harris, Jones of Harris, Jones of Taylor, Kothmann, Lombardino, Longoria, Mauzy, McKnight, Meier, Mengden, Moore, Ogg, Parker, Patman, Schwartz, Sherman, Snelson, Traeger, Truan, Williams.

Absent-excused: Santiesteban.

PRESIDING OFFICER FARABEE: There is a quorum of the Committee of the Whole Senate present. There is a quorum present of the Committee of the Whole House. The joint meeting of the Committee of the Whole Senate and the Committee of the Whole House will come to order.

At this time the Chair will recognize Representative Mike Ezzell from Scurry County to give the invocation.

(Whereupon, at this time the invocation was had.)

CHAIRMAN HALE: In addition to excuses heretofore approved by the House, we excuse Representative Moreno for today because of important business, on motion of Representative Rangel.

PRESIDING OFFICER FARABEE: In accordance with the rules adopted in **H.C.R. 2,** the Lieutenant Governor and the Speaker of the House have appointed counsel, and at this time I would like to introduce those counsel, if you would please

stand: Mr. Bob Maloney, who has been designated by the Speaker of the House as Chief Counsel for the Proponent, Senator Don Adams, Senator Gene Jones, Senator Kent Hance, Representative Lynn Nabers, Representative Ben Grant.

At this time I would like to introduce Counsel for the Respondent; Mr. Waggoner Carr, Mr. Don Nobles, Mr. Tom McCorkle and Mr. Bob Blinderman.

We are convened in this joint meeting in connection with proceeding under Article 15, Section 8 of the Texas Constitution.

At this time I would like to introduce into the record **H.C.R. 1** and **S.C.R. 1.** I would also like to introduce into the record, and let the record reflect at this time, the adoption by both Houses of **H.C.R. 2,** and further request that the Journals of each House introduce the entry of **H.C.R. 1, S.C.R. 1** and **H.C.R. 2.**

Also, at this time I would like the record to reflect the returns on **H.C.R. 1, S.C.R. 1** and **H.C.R. 2** of service on Justice Donald B. Yarbrough prior to this hearing, at the times reflected.

Prior to commencement of consideration of motions and then commencement of the proceeding, I would like to make several announcements. In accordance with Rule 1 of the concurrent resolution, the Committee of the Whole of the House and Senate, while in joint meeting, will be limited to taking evidence and hearing arguments of Counsel on the charges contained in **S.C.R. 1** and **H.C.R. 1,** except for a motion by Counsel for the Proponent or the Respondent, motions, votes or other actions on either Resolution will not be in order.

Also, I would announce that in accordance with Rule 4 of the concurrent resolution, only the following persons may be admitted to the floor while the joint session is in progress: Members of the Committees, the Respondent and his Counsel, witnesses at the time they testify, the Sergeant-at-Arms and Assistant Sergeant-at-Arms of each House; the Chief Clerk of the House of Representatives, the Secretary of the Senate and the Journal Clerk of each House; the Parliamentarian of the joint meeting and the Advisor on Evidence; members of the press admitted under Rule 5; the Official Reporters and other persons authorized in writing by the Presiding Officer of the joint meeting.

At this time I would like to introduce to the joint meeting Professor John Sutton of the University of Texas Law School, who will be present to advise the Chair on matters of evidence and on other legal matters.

I would also like to announce that in accordance with Rule 5 of the concurrent resolution we are not to converse with any member of either Committee in the Chamber during the joint meeting and shall remain in their seats except when entering or leaving the Chamber.

In accordance with Rule 6 of the concurrent resolution, equipment is prohibited during the joint meeting both in the Chamber and in the gallery, and the Sergeant-at-Arms is directed to see that this prohibition is strictly enforced.

Members of the Committees may have questions propounded to a witness, but those questions must be delivered in writing to the Presiding Officer or directly to Counsel, in accordance with the Rules.

And on final adjournment of the joint meeting, each House shall retire to its Chamber and shall consider and determine whether beyond a reasonable doubt the Legislature should address the Governor to remove Donald B. Yarbrough from the office of Associate Justice of the Supreme Court of Texas.

Heretofore the various parties, through their Counsel, have filed Motions; a number of those Motions were ruled on at the request of Counsel for the Respondent prior to this hearing. There were two Motions, one of which would be a proper matter for vote by the joint committees on a motion for Postponement. The other was a Motion in Limine, which was filed at the time of the pre-hearing meeting, and the Chair will later rule upon that Motion.

I would point out that all Motions, other than Motions to Suspend the Rules, motion to Recess or motion to Adjourn, must be in writing, signed by Counsel and filed.

There was heretofore filed by Counsel for the Respondent a motion to Postpone, and the Chair will recognize Counsel for the Respondent at this time to present and to open on that Motion.

MR. McCORKLE: Mr. Chairman, may we have a report of the presence of our witnesses that we had furnished the Speaker on July the 12th; the return of the subpoenaes?

PRESIDING OFFICER FARABEE: Does the Clerk have the return of the subpoenaes? The request was made for proof of service of the witnesses that were heretofore subpoenaed by Counsel for the Respondent.

MR. MALONEY: I would like to know of Counsel whether Justice Yarbrough is going to be present in these proceedings. I would hate to continue the proceedings outside of his absence. If there is some reason for him being absent, I would like to know whether we should proceed with his absence.

PRESIDING OFFICER FARABEE: An inquiry has been made concerning the presence of Justice Yarbrough.

(At this time a Senator from the audience has requested the microphones be given to the speakers.)

SENATOR ADAMS: The inquiry is, where is the Respondent? If he is not here, is there a legal reason why he is not here?

MR. CARR: Mr. Chairman?

PRESIDING OFFICER FARABEE: Mr. Carr?

MR. CARR: I rise to state that for the preliminary matters only will Judge Yarbrough be absent. Otherwise, when we get down to where after this Motion is heard, you will have no further problem.

MR. MALONEY: Mr. Chairman, I would like Counsel to inform us then that he is not going to raise any objections to proceeding at this time simply because Justice Yarbrough is not present at this time.

MR. CARR: I certainly agree to that.

Mr. Chairman, as a matter of fact, I will state for the record that we ask that the proceedings proceed without the presence of the Respondent under the circumstances which I just stated.

PRESIDING OFFICER FARABEE: The record will reflect that.

An inquiry has been made concerning service of subpoenaes which were available to the parties under the Rules. I will call on the Clerk of the House to furnish the information as to subpoenaes and service of subpoenaes.

MR. MALONEY: The Clerk has just handed me —

PRESIDING OFFICER FARABEE: While we are securing the subpoenaes and their returns, then without objection the Chair will make a record of the preliminary hearing which was held at 8:00 p.m. on July 14, 1977, in the Old Supreme Courtroom of the Capitol as part of the record of this proceeding. Is that agreeable with Counsel?

MR. McCORKLE: Yes, we agree.

PRESIDING OFFICER FARABEE: Also, I would like to make it a part of the record in connection with that stipulation the letter of Counsel for the Respondent signed by Don F. Nobles and Waggoner Carr dated July 13, 1977, requesting an immediate hearing on all prehearing Motions filed pursuant to **H.C.R. 2** and the fact that that meeting was granted.

Let the record reflect that the subpoenaes and returns attached thereto have been requested and have been made available to Counsel for the Respondent.

MR. McCORKLE: Mr. Chairman, Respondent wishes to know whether or not the presence of Carol Vance, Kenneth K. Rodgers, Bill Kemp, Ronnie Earle, and John William Rothkopf — We want to know the presence of those witnesses that we have subpoenaed.

PRESIDING OFFICER FARABEE: The Sergeant-at-Arms, can you report the presence of the witnesses except as to —

SENATOR ADAMS: Mr. Chairman, Mr. Carr agreed that Ronnie Earle would be called over here at a convenient time to Mr. Earle, so I would say that he is not present at this time, but he indicated to Mr. Carr that he would be present.

PRESIDING OFFICER FARABEE: That's great. The motion was overruled, but it was understood and stipulated at the prehearing meeting that he would be available at such time as you desired.

(Whereupon, Proponent's Exhibits Numbers 1 through 4 were marked for identification.)

PRESIDING OFFICER FARABEE: Chair announces that response to your request, Mr. Rodgers has been served, and is present. Mr. Rothkopf has been served, but is not present. Mr. Beauchamp has not been served. Effort has been made, but he has not been able to serve a subpoena on Mr. Beauchamp.

MR. McCORKLE: Thank you, Mr. Chairman.

PRESIDING OFFICER FARABEE: Are there any other preliminary matters prior to hearing on the Motion to Postpone? Chair would announce that a Motion to Postpone requires action by the Committee of both Houses. The Proponent of the Motion has the right to open and to close. The Chair at this time will recognize Mr. Carr. Just a moment.

Prior to recognition of Mr. Carr, the Chair would like to have the court reporter mark each of the subpoenaes and have them entered into the record.

(Whereupon, Proponent's Exhibits Numbers 5 through 16 were marked for identification.)

PRESIDING OFFICER FARABEE: Has the court reporter marked the subpoenaes?

THE REPORTER: Yes.

PRESIDING OFFICER FARABEE: They have been entered into the record?

THE REPORTER: Yes.

PRESIDING OFFICER FARABEE: For the record, Mr. Carr, would you stipulate **H.C.R. 1** is identical to **S.C.R. 1**?

MR. CARR: Yes.

PRESIDING OFFICER FARABEE: Mr. Carr, so —

MR. CARR: We so stipulate.

PRESIDING OFFICER FARABEE: Furthermore, Mr. Carr, would you stipulate that on July 6, 1977, at 11:30 a.m., **H.C.R. 1** was served on Mr. Charles Heinman, who was an agent to receive service for Justice Yarbrough?

MR. CARR: Yes, if the record shows that. I have no argument. If it shows that, I do stipulate.

PRESIDING OFFICER FARABEE: The records do reflect that Mr. Russell Kelley and Mr. Robert Williams made service on Mr. Heinman for Justice Yarbrough at that time.

MR. CARR: Then I so stipulate.

PRESIDING OFFICER FARABEE: Furthermore, Mr. Carr, do you stipulate the record that **H.C.R. 2** was served on Justice Yarbrough on July 12 at 11:45 a.m., that by serving Counsel for Justice Yarbrough at 314 West 11th Street?

MR. CARR: You are reading from the record?

PRESIDING OFFICER FARABEE: Yes.

MR. CARR: I so stipulate.

PRESIDING OFFICER FARABEE: Chair under the Rules may set time limits on the argument of motions. After consultation with Counsel for both sides the Chair is setting a 25-minute limit on each side in connection with the Motion to Postpone by Counsel for Justice Donald B. Yarbrough. Counsel for Justice Yarbrough will have an opportunity to open and an opportunity to close. The Chair at this time recognizes Mr. Carr to open on the motion heretofore filed by him to postpone this proceeding.

Mr. Carr.

The inquiry has been made as to the written Motion for Postponement in the event you haven't had an opportunity to examine it. It is to postpone for a period of not less than 30 days.

Mr. Carr.

MR. CARR: Chairman, Mr. Speaker. Can you hear me all right, now? Fine. Thank you. Mr. Lieutenant Governor, Members of the House and Senate. I have been recognized for the purpose of addressing myself to the Motion to Postpone this hearing. Prior to getting into that, I would be grateful for you letting me have a personal word. I want to express my appreciation to each one of you and to the Speaker and the Lieutenant Governor for the courtesy and the warm welcome you have given to me today because of my 10-year service in this House and as a former Speaker, you made me feel welcome personally and I want to thank you for that reception.

We are gathered today for a very serious and extraordinary purpose. There has not been a proceeding such as we are beginning at this time in 103 years. Only did the Joint Session of 1874 meet as you are today for a similar purpose. I rise not asking you for delay because of delay. I ask for delay in the name of justice and in the next few moments I shall lay those reasons out. That we think we need some additional time before we are adequately prepared to present to you the defense of Justice Yarbrough in a fashion that any earnest sincere attorney feels he should for any client. I know that you will give my plea serious consideration because I make my plea in the same way. Three days ago we secured for the first time the right to subpoena witnesses in behalf of Justice Yarbrough. You have heard this morning the roll call which shows that the two main witnesses we have subpoenaed are absent. One cannot be found. The other is secreted away somewhere and is not here. Why do we need these two witnesses for a defense of Justice Yarbrough? If you will look at the copy of the resolution which you passed, you will find in paragraph three of that resolution an allegation that Judge Yarbrough planned and solicited commission of the offense of capital murder, specifically on or about May 13, 1977 in Houston, Harris County, Texas. He knowingly and intentionally solicited and requested that John William "Bill" Rothkopf locate and identify a person or persons willing to commit the capital murder of Bill Kemp. We have subpoenaed Bill Kemp. If we are going to be tried — I use "we" advisedly, of course. If we are going to be tried for planning to commit the murder of Bill Kemp, can there be any doubt in your mind that we need to cross examine Bill Kemp? If you were an attorney representing a client accused of that, do you have any doubt in your professional mind that you must have present Mr. Kemp in order to confront him and to cross examine him and to determine his credibility? Now, would you? And then we have subpoenaed Bill Rothkopf. Everything you are going to hear in this hearing revolves around Bill Rothkopf. I understand you are going to have some tapes. You are going to have some testimony of the transcript. You are going to have everything that you hear the next few days involving Bill Rothkopf. Bill Rothkopf has secreted himself. We understand that he is in some hospital. I have questioned what hospital. The answer is, "It's a secret." I have done everything I can. I have used every legal process known to man to secure the presence of Bill Rothkopf, but Bill Rothkopf is being secreted. By whom? By the authorities of the State of Texas who are guarding him and prevent us from talking to him and this situation has existed even prior to the time you passed your resolution. Now, who is Bill Rothkopf? Well, I have a picture of him. This is the only picture that we know that shows Bill Rothkopf. This picture was taken when he appeared before the Grand Jury in Travis County with a grocery sack over his head. To get him into the courthouse protected by the authorities of Texas. They helped him up the stairs. I don't know whether you can see this or not, but it will be here. They helped him up the stairs because he couldn't see very well with a sack over his head.

SENATOR ADAMS: Mr. Chairman, at this point let me object to any reference made as might apply to the Counsel for the Proponent or members of the House and Senate. When he makes reference to they, it has nothing to do with the Counsel for Proponent or members of the House and Senate. It has nothing to do with this proceeding. We had nothing to do with putting a sack on Mr. Rothkopf's head.

MR. CARR: I agree with that. I don't accuse any of you ladies and gentlemen of doing anything like that and certainly not Senator Adams. Certainly not any of the distinguished gentlemen who are opposing me today. Let me make the record clear on that.

Ladies and gentlemen, if you were an attorney preparing the defense of Justice Yarbrough and you had tapes that were supposedly recorded by Mr. Bill Rothkopf and if he was a party to the allegations that you are going to try Justice Yarbrough, then that is forging an automobile title. He was there. He knows some of the story, but we can't get him. How can we go to trial today without a material witness. We cannot prepare our case and I plead with you in what is fair and what is legal. Please give us the same rights that we would have without question in a courthouse.

Certainly the Legislature should do no less than you have passed the laws for others to abide by. Now, three days and here we are. In your resolution you have pled three items, one being that he committed the offense of aggravated perjury; that is already a matter of an indictment in the Travis County Courthouse, and when it comes to trial that will take several days, if not several weeks. In your second paragraph you charged that Justice Yarbrough committed the offense of forgery, that also is the subject of an indictment now resting in the Travis County Courthouse, and when that comes to trial that also should take several days if not several weeks. In addition to that you are charging Justice Yarbrough with planning and soliciting the offense of capital murder.

In other words, you have wrapped up two complete trials that will take weeks and that need days and weeks to prepare, and you have requested that we prepare in three days.

Now, you say, and it is correct, that ten days prior to today we were given a copy of a resolution; that is correct. But, likewise, it is also correct that we received the right to subpoena our witnesses only three days ago, and it is likewise correct that you passed the rules for these hearings three days ago — or it seems like three. Anyway, it was last Monday — or was it Tuesday? There is no court in Texas that would require that the defense on major charges be prepared in three days, and I ask you again that it is our legal right to be given — our constitutional right to be given sufficient and reasonable time to prepare the defense.

I know you are in a rush, I know you are here because you are away from home, but may I dare suggest that when you start talking about removing one of the high officials of this State, who was legally and duly elected, from his office and destroying his reputation and his livelihood that surely it should touch your hearts that you have some obligation that is paramount and above your convenience. I have only to suggest to you that if that is not important to you, perhaps the reason is that your name is not Yarbrough. If your name is Yarbrough, I can almost guarantee you you would be pleading for a reasonable time, even at your inconvenience, to answer the serious charges which you have brought against him.

As a former member of the House of Representatives, I am interested in the reputation this Legislature has for integrity and reasonableness. I do not desire to participate, if possible, in any ceremony, any proceeding where you will appear to be to the people of this State in a rush to judgment, where you trumpled and trampled upon the constitutional rights of any citizen of this State, whether he be a Supreme

Court Justice or a lowly laborer, whether he be the least among us or the best among us — and surely we are not asking too much.

PRESIDING OFFICER FARABEE: The Chair will recognize Mr. Maloney.

MR. MALONEY: Chairman Farabee and Chairman Hale, Members of the Committee for the Senate and Members of the Committee for the House, I rise to oppose Mr. Carr's Motion for a Postponement on the basis that these charges were presented to Justice Yarbrough ten days ago. In response to a Motion for Discovery filed by Mr. Carr on Justice Yarbrough's behalf, we provided those items that he had asked for, and he has them in his possession and has had them since they were turned over to him.

I believe that this case is ready to go to trial at this time, that this hearing can continue, and we are ready to proceed.

But, I would point out something that gives me great concern; if you voted affirmatively on Mr. Carr's Motion for a Postponement it is an indefinite Motion for Postponement, it is for no less than thirty days and, of course, we will be out of session at that time. I think there is a legal question as to whether or not we might proceed in that event. In any event, I am quite sure that it would be a question that Mr. Carr would present, as the able Counsel that he is. And, I would have to admit there is a question because there is no precedent for it. Therefore, I would request that you deny Mr. Carr's motion.

But I will say this: To determine your own feelings I will file after the vote on this Motion, should it be denied, a Motion for Postponement until 10:00 a.m. this next Monday morning, July 18th. I will not support that Motion but I will give these two Committees the opportunity to vote on it because, I will tell you again, that we are prepared to proceed at this time so that the hearing may continue. But, it is for a time certain, it is for a reasonable time certain and if there are any issues to be determined by Mr. Carr I think it is ample time for them to be determined, over the weekend.

He has mentioned Bill Rothkopf. We have not subpoenaed Bill Rothkopf, he is not a part of our case that we need to present to these Committees. He has mentioned Mr. Kemp, he is not a part of our case. He tells you that he needs them as witnesses for him, but I would remind you that in calling them as witnesses for Justice Yarbrough that he would be bound by that witness' testimony regardless of the effect of what they would testify to. I have not spoken with either of these gentlemen and do not know where they are and don't know what he would expect to present by means of those witnesses.

I would ask you when you vote on this Motion for Postponement, if it is a Motion that is granted, it will mean that we can pretty well shut down the address system, and I would respectfully ask the Committees to vote "no" on a Motion for Postponement.

MR. CARR: Gentlemen and ladies, I'm not going to take but a few moments, but I do think, in justice to correct some of the statements that my good friend Representative Maloney said.

First of all, he said that we have had the records since they gave them to us. I cannot deny that. That is a rather proving statement. The only thing I would like to say is this: When did they get them to us? The first records we received was Tuesday night about 11:00 o'clock. We have completed some that they promised us last night— last night. The records that we have on the tapes are copies. The originals have not been given to us. Those copies, as any lawyer knows, must be compared with the originals to be sure they have not been doctored in some way.

That is our right, and you attorneys would demand the same right. Now, he says that we would be bound by Mr. Rothkopf's testimony. I beg respectively to take issue with that for the simple reason that there is, of course, as we all know, a procedure in our Texas Jurisprudence where you can call a witness as an adverse witness, and I would intend to do that because I do not have the impression that Mr. Rothkopf is a friend, and I would not be bound by his testimony. I intend to attack him and to attack his credibility because you, sitting as a juror, and that's what you are in this case, you are to determine the credibility of the witnesses.

SENATOR ADAMS: We object to Mr. Carr characterizing the members of the House of Representatives and Senate as a Jury. We are not a jury, Mr. Carr. We are members of the House and the Senate. We are members of the Committee as a Whole considering a concurrent resolution, and we object to that characterization.

PRESIDING OFFICER FARABEE: It will be sustained.

MR. CARR: Let me say this, Mr. Chairman: I do not intend to demean you by calling you a juror. I have a high respect for jurors, but if you prefer to be called something else, I'm for it. Just tell me what you are.

Now, as to Mr. Maloney's statement that he will give us until Monday, I must be very candid with you and say that as long as the authorities of the State of Texas continue to hide Mr. Rothkopf, I may well be no better off Monday than I am on Friday. I cannot tell you that I would be ready to go Monday. Of course, I will be able to look at some of the records which they gave us last night, which I have not had an opportunity to do today. I'm appealing to you because our material witnesses are absent, not because of our fault, but because of illness or secreting or hiding. That's all. And when they come out of hiding or they get well, we will be ready. So Monday will not help us unless these miracles occur. So I renew— In the name of fairness, I request that you not trample over the dead body of the constitutional rights of a citizen of this State in order to rush to judgment. Give us a chance. Be fair. We, in return, will put up the defense of Justice Yarbrough, which is so vital to him and would be vital to you if you were in his shoes.

PRESIDING OFFICER FARABEE: All right. For the benefit of the joint meeting, let me read to you the Motion to Postpone which states as follows:

"On this the 12th day of July, 1977, the Counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, without waiver of any right, or privilege of the said Donald B. Yarbrough, respectfully represents to the Honorable Legislature that due and proper preparation of and for the hearing will require, in the opinion and judgment of such Counsel, that a period of not less than thirty (30) days should be allowed to the Associate Justice of the Supreme Court of Texas and his Counsel for such preparation and before the said hearing should proceed."

In addition, and contained therein, there are grounds set out which were covered in the opening and closing.

At this time the joint meeting of the Committee of the Whole Senate and the Whole House is suspended pending the consideration of the Motion of each of the two Committees of the Whole.

LEAVE OF ABSENCE

Senator Sherman was granted leave of absence for today on account of important business on motion of Senator Snelson.

CHAIRMAN HALE: Members of the Committee of the Whole House, the question is shall the Motion for Postponement which you have heard read and which you have heard argument be granted. Under the Rules that have been adopted in **H.C.R. 2**, this requires, as you know, a vote separately by each of the committees. The question is this: Shall the motion for Postponement be granted? All members of the House Committee in favor of the granting of the Motion will vote "aye," and those opposed will vote "no." This is a record vote. Those who favor the Motion to Postpone will vote "aye," and those who oppose the Motion to Postpone will vote "no."

(Roll Call of Committee of Whole House printed in House Journal of July 15, 1977.)

CHAIRMAN HALE: There being sixty-two "ayes" and eighty-two "nos," the Committee of the House fails to approve the Motion to Postpone.

PRESIDING OFFICER FARABEE: The Committee of the Whole Senate will come to order. The question is on the Motion to Postpone as read. The question is this: Shall the Motion to Postpone this hearing for a period of not less than thirty days be granted or be denied. If you desire to vote "yes" or vote to grant the Motion, you should vote "yes." If you desire to deny the Motion, you should vote "no." The Secretary will call the roll:

Yeas: Clower, Creighton, Doggett, Harris, Lombardino, Longoria, Mauzy, Meier, Ogg, Parker, Snelson, Traeger, Truan, Williams.

Nays: Hobby, Adams, Aikin, Andujar, Braecklein, Brooks, Hance, Jones of Harris, Jones of Taylor, Kothmann, Mengden, Patman, Schwartz.

Absent: McKnight, Moore.

Absent-excused: Santiesteban, Sherman.

PRESIDING OFFICER FARABEE: The vote of the Senate being fourteen "ayes" and thirteen "nos," the Motion carries in the Senate. Under Rule 11, a Motion to carry in the joint meeting must carry in both Houses; therefore, the Motion fails.

(Whereupon, at this time an off the record discussion was had.)

PRESIDING OFFICER FARABEE: The joint meeting of the Whole House and the Whole Senate will come to order.

At this time the Chair will recognize Mr. Carr, Counsel for Justice Yarbrough, to make a statement.

MR. CARR: Mr. Chairman, in light of your vote that we shall proceed with the hearing, I read you a statement that I as lead Counsel for Judge Yarbrough has asked me to read.

"For many months I have fought the battle to continue my service on the Supreme Court - a position to which I was legally and duly elected - and to retain my right to follow my profession and life's work, the practice of law.

This fight has resulted in a complete collapse of my life's savings. Today, I have only my home which is heavily mortgaged. I can no longer pay the minimum expenses necessary to defend myself.

I have been told by numerous friends, some of whom are members of the Legislature, that my removal from office is now assured, even before I have 'my day in court.' I accept this as being a fact of life. I do not accept it as being fair or equitable, or in the interest of preserving the constitutional government which I deem so essential for my children, and for the children of my fellow citizens.

Nevertheless, I have come to the conclusion that I should not and can not further subject myself or my beloved family to this ordeal.

I shall today deliver to the Governor my resignation as an Associate Justice of the Texas Supreme Court.

I hold no ill feeling toward anyone. I express my sincere appreciation to all who have helped me and the cause for which we have labored. I am grateful to those who elected me. I extend to each member of the Legislature my personal good wishes as they continue to serve our people." Signed, "Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas."

Mr. Chairman, I ask that this statement be entered into the official records of this hearing as an Exhibit, or whatever, and I so give you a copy for that purpose.

Ladies and gentlemen of the joint session, I appreciate your attendance.

PRESIDING OFFICER FARABEE: Thank you, Mr. Carr.

I will ask that the Court Reporter mark the statement executed by Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, and then enter the same into the record.

(Whereupon, Respondent's Exhibit 1 was marked for identification.)

PRESIDING OFFICER FARABEE: The Joint Meeting of the Committee of the Whole will come to order.

Mr. Maloney.

MR. MALONEY: Mr. Chairman, I move the Committee of the House, and the Committee of the Senate stand in recess until 1:30 today.

PRESIDING OFFICER FARABEE: The joint meeting is suspended pending consideration of the motion to recess until 1:30 this afternoon for consideration by each of the two Committees of the Whole.

Mr. Hale.

CHAIRMAN HALE: The question before the House is the motion by Mr. Maloney to recess until 1:30 this afternoon. Is there objection on the part of the members of the House?

Chair hears no objection, the motion is adopted.

PRESIDING OFFICER FARABEE: Senator Aikin. Committee of the Whole of the Senate will come to order.

Senator Aikin.

SENATOR AIKIN: I move we repair to the Senate Chamber immediately.

PRESIDING OFFICER FARABEE: Senator Aikin, you might hold your motion a moment.

The question is on the motion, first, to recess until 1:30. Meeting after that the Chair will recognize Senator from Lamar for another motion. Is there objection to the first motion to recess the joint meeting until 1:30 this afternoon? There being none, the motion is carried.

Senator from Lamar.

SENATOR AIKIN: I move Senate Committee of the Whole rise and report progress and repair to the Senate Chamber immediately.

PRESIDING OFFICER FARABEE: Senator from Lamar moves that the Senate rise and report progress immediately to the Senate Chamber. Is there objection? Motion carries.

(Whereupon, at 10:25 a.m. the Joint Session of the House and Senate recessed to reconvene at 1:30 p.m., at which time the following proceedings were had:)

CHAIRMAN HALE: Members of the Committee, we will stand at ease for just a moment to await the arrival of distinguished colleagues from across the hall.

(Brief recess.)

CHAIRMAN HALE: The Committee of the Whole House will please come to order. If the members would kindly take your seats, we are ready to proceed with this Joint Session.

If there are any on the floor not entitled to the privilege during this Joint Session, would they please retire.

All members of the House Committee of the Whole who are present will please indicate that by registering on the board.

(Roll Call of Committee of the Whole House printed in House Journal of July 15, 1977.)

CHAIRMAN HALE: Show Mr. Edwards present. Have you all registered?

A full quorum of the House Committee of the Whole is present.

PRESIDING OFFICER FARABEE: The Committee of the Whole Senate will come to order. The Secretary will call the roll.

The roll was called and the following were present: Hobby, Adams, Aikin, Andujar, Braecklein, Brooks, Clower, Creighton, Doggett, Farabee, Hance, Harris, Jones of Harris, Jones of Taylor, Kothmann, Lombardino, Longoria, Mauzy, McKnight, Meier, Mengden, Moore, Ogg, Parker, Patman, Schwartz, Snelson, Traeger, Truan, Williams.

Absent-excused: Santiesteban and Sherman.

PRESIDING OFFICER FARABEE: There is a quorum present of the Committee of the Whole Senate and quorum present of the Committee of the Whole House. The joint meeting of the Committees of the Whole will come to order. I will ask the Sergeant-at-Arms to pass out the transcript of the proceedings this morning. I would also at this time advise the members of the joint committee of correspondence received by me from Governor Dolph Briscoe.

"Honorable Ray Farabee, Presiding Officer of the Joint Session of the 65th Legislature, First Called Session sitting as Committees of the Whole, Dear Senator Farabee: You are advised that I have this date received, accepted and filed with the

Office of Secretary of State the resignation of Donald B. Yarbrough as Associate Justice of the Supreme Court of Texas. Sincerely, Dolph Briscoe, Governor of Texas."

In addition, and attached to that correspondence, are copies of letters, and I will read those for the record at this time.

"Honorable Dolph Briscoe, Governor of Texas, Dear Sir: The purpose of this letter is to advise and tender my resignation as Associate Justice of the Supreme Court of Texas, effective immediately. It has been a pleasure to speak for what I believe to have been the best interests of the people during my tenure. My concern for their welfare will continue, and my prayers are with you as you consider the selection of my successor. With warm personal regards, I am, Very Sincerely, Donald B. Yarbrough, Witness this 15th day of July, 1977: Waggoner Carr, Donald F. Nobles."

And, additionally attached, and I shall read into the record at this time, a letter from Governor Dolph Briscoe, each of these letters being dated July 15, 1977, addressed to The Honorable Mark White, Secretary of State, Capitol Building, Austin, Texas.

"Dear Mr. Secretary: Please file the attached letter of resignation of Donald B. Yarbrough as Associate Justice of the Supreme Court of Texas which I have received and accepted this date. Sincerely, Dolph Briscoe, Governor of Texas."

PRESIDING OFFICER FARABEE: Mr. Maloney.

MR. MALONEY: Mr. Chairman, I move that those letters be placed as part of the permanent record of the joint committee.

PRESIDING OFFICER FARABEE: The motion is accepted and adopted, and these letters will be marked and made a part of the record of the proceedings.

COURT REPORTER: Mr. Chairman, would you like these Exhibits marked separately?

PRESIDING OFFICER FARABEE: Yes, if you would, please.

(Whereupon, Proponent's Exhibits numbered 17, 18 and 19 were marked for identification.)

SENATOR AIKIN: Mr. Chairman, I move to suspend the rules and permit each House to discharge its Committee of the Whole —

SENATOR ADAMS: Mr. Chairman, may I ask you, before you accept that motion, to move to excuse the witnesses that are under the process of this body?

PRESIDING OFFICER FARABEE: Yes. The motion has been made to excuse the witnesses; the motion is granted.

Senator Aikin, would you restate your motion?

SENATOR AIKIN: I move to suspend the rules and permit each House to discharge its Committee of the Whole.

PRESIDING OFFICER FARABEE: The motion has been made to suspend the rules and to allow each House to resolve the Committees of the Whole. Is there objection to the motion?

(No objection.)

SENATOR AIKIN: I move, Mr. Chairman, that the joint meeting between the House and Senate, as a Committee of the Whole, adjourn sine die.

PRESIDING OFFICER FARABEE: The motion has been made that each of the Committees of the Whole be dissolved as a joint meeting; is there objection?

(No objection.)

SENATOR AIKIN: Now, Mr. Chairman, I move that the Senate Committee of the Whole rise and report progress and repair to the Senate Chamber.

PRESIDING OFFICER FARABEE: There being no objection to the first motion, the motion carries.

You have heard the second motion; is there objection to that?

(No objection.)

If not, the motion carries.

(Proceedings ended.)

CERTIFICATE

THE STATE OF TEXAS X
X
COUNTY OF TRAVIS X

We, the undersigned, Notaries Public in and for Travis County, Texas, do hereby certify that the above and foregoing forty-two (42) pages constitute a full, true and accurate transcription of the proceedings before the Sixty-fifth Legislature Sitting as a Committee of the Whole Jointly in the Chamber of the House of Representatives, convening July 15, 1977, as reported by us, and as thereafter transcribed by the undersigned Court Reporters.

GIVEN UNDER OUR HANDS AND SEALS OF OFFICE on this the 15th day of July, 1977.

E. GEORGETTE ERSKINE

JACK D. SYKES

CYNTHIA VOHLKEN

(Proponents 2
ege 7/15/77)

(FIRST CALLED SESSION
(FILED JULY 5, 1977)

By: /s/Lauhoff, Whitmire
Davis

H.C.R. No. 1

HOUSE CONCURRENT RESOLUTION

BE IT RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That pursuant to Article XV, Section 8, of the Texas

Constitution, the Governor of the State of Texas be and is hereby addressed to remove Donald B. Yarbrough from the office of Associate Justice of the Supreme Court of Texas for the following causes:

1. That on June 28, 1977, he committed the offense of aggravated perjury. Specifically, on that date he personally appeared at an official proceeding, that is, a regular session of the Travis County Grand Jury, April Term, 1977, and in connection with and during that officil proceeding and after being duly sworn by an officer authorized by law to administer oaths, did knowingly and intentionally make, under oath, a false statement with knowledge of the statement's meaning and with intent to deceive; the false statement was material to the issue under inquiry during the official proceeding; the false statement could have affected the course and outcome of the official proceeding; and the statement was required and authorized by law to be made under oath.

2. That on or about May 16, 1977, he committed the offense of forgery. Specifically, on that date in Travis County, Texas, he did knowingly and intentionally, and with the intent to defraud and harm another, make and execute a writing so that it purports to be the act of another who did not authorize that act; and said writing is, and purports to be, an instrument issued by the State of Alabama, County of Covington; and at the same time and place did knowingly and intentionally, and with the intent to defraud and harm another, make and execute a writing so that it purports to have been executed on the 10th day of December, 1976, which time was a time other than was in fact the case; and said writing is, and purports to be, an instrument issued by the State of Alabama, County of Covington.

3. That on numerous occasions in the months of May and June, 1977, he planned and solicited commission of the offense of capital murder. Specifically, on or about May 13, 1977, in Houston, Harris County, Texas, he knowingly and intentionally solicited and requested that John William "Bill" Rothkopf locate and identify a person or persons willing to commit the capital murder of Bill Kemp, for and in consideration of a sum of money to be paid by Donald B. Yarbrough to the killer through Rothkopf.

HOUSE OF REPRESENTATIVES

AUSTIN

July 15, 1977

STATE OF TEXAS

COUNTY OF TRAVIS

I, BETTY MURRAY, Chief Clerk of the House of Representatives, do hereby certify that the attached page(s) represent(s) a true and correct copy of House Concurrent Resolution No. 1 filed in this office on July 5, 1977.

/s/Betty Murray
Chief Clerk
House of Representatives

Proponent's 1
ege 7/15/77)

By: /s/Adams, Hance,
Gene Jones

S.C.R. No. 1

SENATE CONCURRENT RESOLUTION

BE IT RESOLVED by the Senate of the State of Texas, the House of Representatives concurring, That pursuant to Article XV, Section 8, of the Texas Constitution, the Governor of the State of Texas be and is hereby addressed to remove Donald B. Yarbrough from the office of Associate Justice of the Supreme Court of Texas for the following causes:

1. That on June 28, 1977, he committed the offense of aggravated perjury. Specifically, on that date he personally appeared at an official proceeding, that is, a regular session of the Travis County Grand Jury, April Term, 1977, and in connection with and during that official proceeding and after being duly sworn by an officer authorized by law to administer oaths, did knowingly and intentionally make, under oath, a false statement with knowledge of the statement's meaning and with intent to deceive; the false statement was material to the issue under inquiry during the official proceeding; the false statement could have affected the course and outcome of the official proceeding; and the statement was required and authorized by law to be made under oath.

2. That on or about May 16, 1977, he committed the offense of forgery. Specifically, on that date in Travis County, Texas, he did knowingly and intentionally, and with the intent to defraud and harm another, make and execute a writing so that it purports to be the act of another who did not authorize that act; and said writing is, and purports to be, an instrument issued by the State of Alabama, County of Covington; and at the same time and place did knowingly and intentionally, and with the intent to defraud and harm another, make and execute a writing so that it purports to have been executed on the 10th day of December, 1976, which time was a time other than was in fact the case; and said writing is, and purports to be, an instrument issued by the State of Alabama, County of Covington.

3. That on numerous occasions in the months of May and June, 1977, he planned and solicited commission of the offense of capital murder. Specifically, on or about May 13, 1977, in Houston, Harris County, Texas, he knowingly and intentionally solicited and requested that John William "Bill" Rothkopf locate and identify a person or persons willing to commit the capital murder of Bill Kemp, for and in consideration of a sum of money to be paid by Donald B. Yarbrough to the killer through Rothkopf.

THE SENATE OF
THE STATE OF TEXAS
AUSTIN

July 15, 1977

I hereby certify that this is a true and correct copy of Senate Concurrent Resolution No. 1, as filed on July 11, 1977.

/s/Betty King
Secretary of the Senate

STATE OF TEXAS
HOUSE OF REPRESENTATIVES

Austin

July 5, 1977

Dear Justice Yarbrough:

Enclosed is a copy of a resolution filed this date for consideration by the 65th Legislature sitting in special session beginning July 11, 1977. The resolution addresses the Governor of Texas to remove you from office as Judge of the Supreme Court of Texas as provided by Section 8 of Article 15 of the Constitution of Texas.

Present plans are for the resolution to be considered in the House of Representatives at 9 a.m. Friday, July 15, 1977.

The causes for removal are stated in the resolution and, as provided by the Constitution, you are hereby notified of the impending action and advised that you will be admitted to a hearing in your own defense before the Legislature in the House Chamber at the State Capitol at 9 a.m. Friday, July 15, 1977.

Sincerely,

/s/Bill Clayton

BC:es

cc: Waggoner Carr

The Honorable Donald B. Yarbrough
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, Texas

(FIRST CALLED SESSION
FILED JULY 15, 1977)

By: /s/Lauhoff, Whitemire Davis H.C.R. No. 1

HOUSE CONCURRENT RESOLUTION

BE IT RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That pursuant to Article XV, Section 8, of the Texas Constitution, the Governor of the State of Texas be and is hereby addressed to remove Donald B. Yarbrough from the office of Associate Justice of the Supreme Court of Texas for the following causes:

1. That on June 28, 1977, he committed the offense of aggravated perjury. Specifically, on that date he personally appeared at an official proceeding, that is, a regular session of the Travis County Grand Jury, April Term, 1977, and in connection with and during that official proceeding and after being duly sworn by an officer authorized by law to administer oaths, did knowingly and intentionally make, under oath, a false statement with knowledge of the statement's meaning and with intent to deceive; the false statement was material to the issue under inquiry during the official proceeding; the false statement could have affected the course and outcome of the official proceeding; and the statement was required and authorized by law to be made under oath.

2. That on or about May 16, 1977, he committed the offense of forgery. Specifically, on that date in Travis County, Texas, he did knowingly and

intentionally, and with the intent to defraud and harm another, make and execute a writing so that it purports to be the act of another who did not authorize that act; and said writing is, and purports to be, an instrument issued by the State of Alabama, County of Covington; and at the same time and place did knowingly and intentionally, and with the intent to defraud and harm another, make and execute a writing so that it purports to have been executed on the 10th day of December, 1976, which time was a time other than was in fact the case; and said writing is, and purports to be, an instrument issued by the State of Alabama, County of Covington.

3. That on numerous occasions in the months of May and June, 1977, he planned and solicited commission of the offense of capital murder. Specifically, on or about May 13, 1977, in Houston, Harris County, Texas, he knowingly and intentionally solicited and requested that John William "Bill" Rothkopf locate and identify a person or persons willing to commit the capital murder of Bill Kemp, for and in consideration of a sum of money to be paid by Donald B. Yarbrough to the killer through Rothkopf.

Received from Cathy Lott one envelope from the Speaker of the House.

July 5, 1977 /s/Charles P. Suakard

This is to certify that the attached are true and correct copies of the letter and resolution delivered to Associate Justice Donald B. Yarbrough on July 6, 1977.

/s/Bill Clayton, Speaker, 65th Legislature
Texas House of Representatives

The State of Texas

County of Travis

Before me, the undersigned authority, on this day personally appeared Bill Clayton known to me to be the person whose name subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the fifteenth day of July, A.D 1977.

/s/Connie Saathoff, Notary Public in and
for Travis County, Texas

Served to Charles Hineman
7/6/77 11:30 A.M.

Russell Kelly
Robert S. Williams

(Proponent's 3
ege 7/15/77)

(ENROLLED)

H.C.R. No. 2

HOUSE CONCURRENT RESOLUTION

WHEREAS, Senate Concurrent Resolution No. 1, filed in the senate, and House Concurrent Resolution No. 1, filed in the house of representatives, propose to address the Governor of Texas to remove Associate Justice Donald B. Yarbrough from office as provided by Article XV, Section 8, of the Texas Constitution; and

WHEREAS, The constitution provides that the judge so intended to be removed shall be admitted to a hearing in his own defense before any vote for such address shall pass; and

WHEREAS, The hearing can most expeditiously be conducted by each house of the legislature sitting as a committee of the whole but meeting jointly in the chamber of the house of representatives; and

WHEREAS, Such a joint hearing would insure that all members of the legislature would hear the same testimony and the judge intended to be removed and his legal counsel, witnesses, and other participants would not be inconvenienced by having to appear before the two bodies separately on the same causes; and

WHEREAS, A joint hearing would reduce the cost of the hearing for both the judge intended to be removed and the taxpayers of the state; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring:

Section 1. On Friday, July 15, 1977, at 9 a.m., committees of the whole house of representatives and the whole senate shall convene in a joint meeting in the chamber of the house of representatives to hear evidence and argument on the charges contained in Senate Concurrent Resolution No. 1 and House Concurrent Resolution No. 1, addressing the governor to remove from office Associate Justice of the Supreme Court Donald B. Yarbrough.

Sec. 2. At the beginning of the joint meeting, as well as on the convening of each daily session of the joint meeting and immediately following any recess or adjournment, the chairman of the committee of the whole senate shall cause the roll of members of that committee to be called and announce whether a quorum is present. The chairman of the committee of the whole house shall then cause the members of that committee to register their attendance and shall announce whether a quorum is present. When it is determined that a quorum of each committee is present, the joint meeting shall proceed in accordance with the rules prescribed in this resolution.

Sec. 3. As soon as possible after adoption of this resolution, the speaker and lieutenant governor acting jointly shall appoint members of the legislature to act as counsel for the proponents in the joint meeting. The speaker shall designate one of the appointees as chief counsel.

Sec. 4. The following rules govern the proceedings conducted before the joint committee meeting required by this resolution:

Rule 1. SCOPE OF JOINT MEETING. The committees while in joint meeting shall be limited to taking evidence and arguments of counsel on the charges contained in Senate Concurrent Resolution No. 1 and House Concurrent Resolution No. 1. Except for motions by counsel for the proponents or the respondent, motions, votes, or other action on either resolution are not in order.

Rule 2. PRESIDING OFFICER. The chairman of the committee of the whole senate shall preside at the joint meeting.

Rule 3. ORDER AND SECURITY. The sergeant-at-arms of the house and the sergeant-at-arms of the senate, acting jointly, shall maintain order and security in the chamber of the house and its gallery and approaches.

Rule 4. ADMISSION TO FLOOR. Only the following persons may be admitted to the floor while the joint meeting is in progress:

(1) members of the committees;
(2) the respondent and his counsel;
(3) witnesses at the time they testify;
(4) the sergeant-at-arms and assistant sergeants-at-arms of each house;
(5) the chief clerk of the house of representatives, the secretary of the senate, and the journal clerk of each house;
(6) the parliamentarian of the joint meeting and the advisor on evidence;
(7) members of the press admitted under Rule 5;
(8) the official reporter; and
(9) other persons authorized in writing by the presiding officer of the joint meeting.

Rule 5. PRESS. Representatives of the media shall be confined to the area of the chamber set aside for the media, and shall be limited in number to the number of seats provided in that area. The sergeant-at-arms of the house shall reserve seats in the gallery for the media in the number designated by the presiding officer. Representatives of the press shall not converse with any member of either committee in the chamber during the joint meeting, and shall remain in their seats except when entering or leaving the chamber.

Rule 6. CAMERAS. Cameras and photographic equipment are prohibited during a joint meeting, both in the chamber and in the gallery. The presiding officer and the sergeants-at-arms shall see that this rule is strictly enforced.

Rule 7. RECESS OR ADJOURNMENT. (a) The two committees by agreement may recess or adjourn the joint meeting from time to time.

(b) The two committees by agreement may finally adjourn the joint meeting when its business has been completed. On final adjournment, each of the committees shall rise and report to its respective house.

(c) Agreement of the two committees for purposes of this rule may be evidenced by each committee's adoption of an appropriate motion. To consider a motion to recess or adjourn a joint meeting, the presiding officer shall announce that the joint meeting is suspended pending the consideration of the motion by each of the two committees of the whole. When the two committees of the whole have acted on the motion, the presiding officer shall call the joint meeting to order and announce the result.

Rule 8. QUORUM. Two-thirds of the membership of each committee constitutes a quorum.

Rule 9. RIGHTS OF RESPONDENT. The judicial official whose removal by address is proposed (hereinafter referred to as respondent) is entitled to be present at all proceedings of the committees, to be represented by counsel, to present pleadings, evidence, motions, and argument, and to cross-examine witnesses.

Rule 10. MOTIONS. (a) Except for motions to recess, adjourn, or suspend these rules, all motions must be made in writing, signed by counsel for proponents or respondent, and filed with the chief clerk of the house and the secretary of the senate.

(b) The presiding officer of the joint meeting shall rule on all motions except motions to postpone, motions to recess or adjourn, and motions to suspend these rules. A ruling of the presiding officer is not subject to appeal. If a motion to postpone is made, the presiding officer shall suspend the joint meeting and a vote shall be taken of each committee of the whole, the chairman of each committee announcing the result.

(c) Except for a motion to recess or adjourn, a motion is debatable, and the moving party is entitled to open and close.

Rule 11. VOTES. If a vote is taken on any motion, including a motion to recess or adjourn, the motion carries only if it receives an affirmative vote of a majority of those present and voting of each committee of the whole.

Rule 12. ORDER OF PROCEEDING. (a) The counsel for proponents are entitled to open and to close.

(b) The respondent is entitled to make an opening statement either before the presentation of evidence begins or at the conclusion of presentation of evidence by the proponents, at his option. The respondent is also entitled to make a closing statement.

(c) The presiding officer may impose limitations on the duration of the opening and closing statements by both the proponents and the respondent.

Rule 13. PRODUCTION OF WITNESSES AND OTHER EVIDENCE. (a) Counsel for the proponents and the respondent are each entitled to have process issued to require the attendance of witnesses and the production of papers and other items that are relevant and material to an issue before the joint meeting.

(b) The speaker of the house of representatives may issue process in his name on the written request of one or more counsel for the proponents, or the respondent or his counsel. The process may be addressed to and served by any peace officer or a sergeant-at-arms or assistant sergeant-at-arms of either house at any place within this state. The officer serving a subpoena shall file with the chief clerk of the house of representatives a return of service. The process shall be in a form approved by the speaker.

(c) To insure compliance with process the speaker may issue writs of attachment.

(d) As soon as practicable after issuance of process, the speaker shall notify opposing party or his counsel of the name of the witness subpoenaed and an itemized list of any papers or other items subpoenaed.

Rule 14. WITNESSES. (a) The presiding officer shall administer an oath to each person appearing as a witness before the joint committee meeting.

(b) Unless the witness objects to taking an oath that includes the phrase "so help me God," the presiding officer shall administer the following oath: "You (and each of you) do solemnly swear or affirm that the evidence you give at this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God." However, if the witness objects to that oath, the presiding officer shall administer the following oath: "Understanding the pains and penalties of perjury, you (and each of you) do solemnly swear or affirm that the evidence you give at this hearing shall be the truth, the whole truth, and nothing but the truth."

(c) No witnesses may be heard except those called by the proponents and the respondent.

(d) Witnesses appearing subject to process issued pursuant to this resolution are entitled to reimbursement for expenses as provided by law for witnesses appearing before a grand jury.

Rule 15. SEPARATION OF WITNESSES. (a) At the request of counsel for the proponents or for the respondent, the witnesses for both sides may be sworn and removed from the chamber of the house to some other place where they cannot hear the testimony given by other witnesses before the joint committee meeting. However, members of the committees and the respondent and his counsel may not be excluded under this rule.

(b) The presiding officer shall instruct witnesses separated under this rule that they are not to converse with each other or with any other person, other than counsel for the proponents and the respondent and his counsel, about matters under consideration before the joint committee meeting and that they are not to read any report of or comment on the evidence presented before the joint committee meeting.

Rule 16. EVIDENCE. (a) The admissibility of evidence is governed by the rules of evidence applicable in the civil courts of this state.

(b) The presiding officer shall decide all questions of evidence, and his rulings may not be appealed.

Rule 17. PARTICIPATION BY MEMBERS. (a) Members of the committees may have questions propounded to a witness after conclusion of examination and cross-examination of the witness, but all questions by members other than counsel for the proponents must be reduced to writing and delivered to the presiding officer. The presiding officer shall provide copies of each question to counsel for the proponents and the respondent.

(b) At the conclusion of examination and cross-examination of each witness, the presiding officer shall take up the members' questions in the order in which they were delivered to him. On each question, he shall first determine if the member still wishes the question to be propounded. If the member does not withdraw the question, the presiding officer shall determine if either counsel has any objection to the question. If neither counsel objects or if all objections are overruled, the presiding officer shall propound the question. If the presiding officer sustains an objection to the question, he shall deliver the question to the reporter for inclusion in the record.

(c) A member may also submit questions to counsel for the proponents or for the respondent. However, counsel may decline to propound a question submitted by a member.

Rule 18. RECORD OF PROCEEDINGS. (a) The house shall provide for a verbatim record of all proceedings before the joint committee meeting. The house shall require the record to be printed as soon as practicable after the conclusion of each day's proceedings.

(b) Each item of documentary evidence shall be entered in the record, but the original may be released if a duplicate is available for the record.

(c) The presiding officer shall deliver a copy of each day's record as soon as it is printed to the proponents and respondent and their counsel. He shall make additional copies available for the committee members.

(d) The official record of the proceedings shall be reproduced as an appendix to the journal of each house.

Rule 19. COSTS. The house of representatives shall pay all costs incurred in conducting the proceedings before the joint committee meeting. The senate shall reimburse the house for one-half the costs.

Rule 20. ADDITIONAL RULES. The two committees, by a majority vote of the membership of each committee, may adopt additional rules that are not inconsistent with these rules to govern proceedings before the joint committee meeting.

Rule 21. SUSPENSION OF RULES. These rules may be suspended only by affirmative vote of two-thirds of the members of each committee present and voting.

Rule 22. RULES SILENT. When these rules are silent, the rules of the house and the senate govern the conduct of the respective committees while in joint session.

Sec. 5. On final adjournment of the joint meeting, each house shall retire to its chamber and shall consider and determine whether, beyond a reasonable doubt, the legislature should address the governor to remove Donald B. Yarbrough from the office of associate justice of the supreme court.

Sec. 6. The sergeant-at-arms or an assistant sergeant-at-arms of the house of representatives shall serve the respondent personally with a certified copy of this resolution and shall file a return of service with the chief clerk of the house of representatives.

I certify that this is a true and correct copy of H.C.R. No. 2 as passed by the legislature and signed by the governor.

/s/Betty Murray
Chief Clerk of the House

OFFICER'S RETURN

Came to hand on the 12 day of July, 1977, at 11:45 a.m. o'clock, by delivering a certified copy of this resolution to Donald B. Yarbrough, Respondent, at 314 West 11th at 12:00 N in Travis County, Texas.

/s/Russell Kelley
Name of officer

/s/Sergeant at Arms
Title of officer

SUBPOENA

STATE OF TEXAS }
SENATE AND HOUSE }
OF REPRESENTATIVES }

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon John Williams Rothkopf who resides or may be found at _____ in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the thirteenth day of~~ on the 15th day of July, 1977, at 9:00 a.m. ~~o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

To bring the sack worn in connection with his appearance before the Travis County Grand Jury and to bring any and all documents, memorandums relating to alleged forged title and any and all driver's licenses and credit cards issued to you under any name.

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13 day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13 day of July, 1977, at 3 p.m. o'clock, by delivering this subpoena to John Williams Rothkopf, the witness named in it, at _____ in Harris County, Texas.

Name of officer

Title of officer
KENNETH K. RODGERS
DISTRICT ATTORNEY'S INVESTIGATOR
HARRIS COUNTY, TEXAS

00026

Proponent 5
C.V. 7-15-77

SUBPOENA

STATE OF TEXAS I
SENATE AND HOUSE I
OF REPRESENTATIVES I

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Honorable Carol S. Vance, District Attorney who resides or may be found at Harris County Courthouse, Houston in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the instanter, day of~~ on the 15th day of July, 1977, at 9:00 a.m. ~~1977, at _____ m. o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

_____

_____

_____

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13 day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13 day of July, 1977, at 10 a.m. o'clock, by delivering this subpoena to Carol S. Vance the witness named in it, at State Capitol in Travis County, Texas.

Name of officer

Sergeant at Arms
Title of officer

00027

Proponent 6
L.V. 7-15-77

SUBPOENA

STATE OF TEXAS
SENATE AND HOUSE
OF REPRESENTATIVES

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Kenneth K. Rogers, D.A. Investigator who resides or may be found at Harris County Courthouse, Houston in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the instantor day of~~ 15th day of July, 1977 at 9:00 a.m. ~~o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13 day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13 day of July, 1977, at 9 A.M. o'clock, by delivering this subpoena to Kenneth K Rogers the witness named in it, at State Capitol Rm. 2S5 in Travis County, Texas.

Name of officer

Title of officer

G0028

Proponent 7
C.H. 7-15-17

SUBPOENA

STATE OF TEXAS [
SENATE AND HOUSE [
OF REPRESENTATIVES [

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Honorable Ronnie Earle, District Attorney, who resides or may be found at Travis County Courthouse, Austin in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the~~ ~~instant~~ ~~day of~~ 15th day of July, 1977, at 9:00 a.m. ~~o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13 day of July 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13th day of July 1977, at 10:25 a.m. o'clock, by delivering this subpoena to Ronnie Earle the witness named in it, at State Capitol in TRAVIS County, Texas.

Name of officer

Senate Sergeant-at-Arms
Title of officer

00029

Proponent 8
E.V. 7-15-77

SUBPOENA

STATE OF TEXAS |
SENATE AND HOUSE |
OF REPRESENTATIVES |

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Honorable Ronnie Earle, District Attorney who resides or may be found at Travis County Courthouse, Austin in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the~~ ~~day of~~ on the 15th day of July, 1977, at 9:00 a.m. ~~o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13 day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the _____ day of _____, 1977, at _____ m. o'clock, by delivering this subpoena to _____ the witness named in it, at _____ in _____ County, Texas.

Name of officer

Title of officer

C0030

Proponent 9
C.U. 7-15-77

SUBPOENA

STATE OF TEXAS)
SENATE AND HOUSE)
OF REPRESENTATIVES)

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Ralph W. Yarborough who resides or may be found at 721 Brown Bldg., Austin in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the~~ instanter ~~day of _____, 1977, at _____ m. o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

All copies of letters to members of the House and Senate and the Lt. Governor concerning Donald B. Yarbrough

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 12th day of July 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 12th day of July, 1977, at 4:50 p.m. o'clock, by delivering this subpoena to RALPH W. YARBOROUGH the witness named in it, at 721 BROWN BLDG. in AUSTIN, TRAVIS Co. County, Texas.

MICHAEL FOWLER
Name of officer

ADM. ASST., OFFICE of the SERGEANT AT ARMS, TEXAS HOUSE OF REPRESENTATIVES
Title of officer

C0031

Proponent 10
A.V. 7-15-77

SUBPOENA

STATE OF TEXAS }
SENATE AND HOUSE }
OF REPRESENTATIVES }

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Hon. Davis Grant who resides or may be found at State Bar of Texas, Austin in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the~~ instanter ~~day of _____, 1977, at _____ m. o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

All audio tapes, documents, memorandums, letters or correspondence pertaining to Donald B. Yarbrough, and the subject matter of H.C.R. No. 1 and S.C.R. No. 1

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13 day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13 day of July, 1977, at 10:45 a.m. o'clock, by delivering this subpoena to Davis Grant the witness named in it, at State Capitol in Travis County, Texas.

Name of officer

Sergeant at Arms
Title of officer

Proponent 11

60032

E.V. 7-11-77

SUBPOENA

STATE OF TEXAS
SENATE AND HOUSE
OF REPRESENTATIVES

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Don Shelby who resides or may be found at KPRC Studios, 8181 SW Fwy, Houston, in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, on the 15th day of July, 1977, at 9:00a.m. o'clock, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

All video & audio tapes and film in his possession or under his control, pertaining to Donald Yarbrough

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13th day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13 day of July, 1977, at 6⁰⁰ P.m. o'clock, by delivering this subpoena to Don Shelby the witness named in it, at above Address in Travis County, Texas.

Name of officer

Title of officer

C0033

Proponent 12
H.J. 7-15-77

SUBPOENA

STATE OF TEXAS I
SENATE AND HOUSE I
OF REPRESENTATIVES I

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Jim Brooks who resides or may be found at Travis Co. Dist. Atty.'s office in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, ~~on the~~ ~~day of~~ instanter, 1977, ~~at~~ ~~o'clock~~, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

Transcript of testimony of Donald B. Yarbrough given before the Travis County Grand Jury on June 28, 1977, and all other records, recordings, shorthand notes, and original stenographic notes of such testimony.

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 12th day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 12th day of July, 1977, at 1:45 p.m. o'clock, by delivering this subpoena to Jim Brooks, the witness named in it, at Travis Co. Dist. Atty.'s office in Travis County, Texas.

Name of officer

Senate Sergeant at Arms
Title of officer

Proponent 13

00034 H.V. 7-15-77

SUBPOENA

STATE OF TEXAS
SENATE AND HOUSE
OF REPRESENTATIVES

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon John Holmes, Asst. Dist. Atty. Harris County who resides or may be found at Harris County Court House in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, on the 15th day of July, 1977, at 9:00 m. o'clock, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

Property safe log book - showing the sequestering and security of the tape recordings of John William Rothkopf and Donald B. Yarbrough.

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13th day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 13 day of July, 1977, at 5:00 a.m. o'clock, by delivering this subpoena to John Holmes, the witness named in it, at Houston in Travis County, Texas.

Name of officer

Title of officer

C0035

Proponent 14
H.V. 7-15-77

SUBPOENA

STATE OF TEXAS }
SENATE AND HOUSE }
OF REPRESENTATIVES }

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Randy Lewin who resides or may be found at KTVV Television, 908 W. MLK, Austin in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, on the 15th day of July, 1977, at 9:00 a.m. o'clock, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

All mechanical recordings containing statements made by Donald B. Yarbrough.

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 13th day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 14 day of July, 1977, at 5:00p.m. o'clock, by delivering this subpoena to Randy Lewin the witness named in it, at KTVV Television, 908 MLK, Austin in Travis County, Texas.

Name of officer

Asst. Sgt. at Arms
Title of officer

Proponent 15
C.V. 7-15-77

36

SUBPOENA

STATE OF TEXAS]
SENATE AND HOUSE]
OF REPRESENTATIVES]

TO THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OR THE SENATE, ANY ASSISTANT SERGEANT-AT-ARMS OF EITHER HOUSE, OR ANY PEACE OFFICER:

You are commanded to summon Martin Jay Riekenberg who resides or may be found at Tracor Inc. in Austin in the State of Texas, to appear before the Committee of the Whole House and the Committee of the Whole Senate, meeting jointly in the chamber of the House of Representatives in Austin, on the 15th day of July, 1977, at 9:00 a.m. o'clock, to testify as a witness in the consideration of House Concurrent Resolution No. 1 and Senate Concurrent Resolution No. 1, regarding the removal by address of Associate Justice of the Supreme Court Donald B. Yarbrough. The witness is commanded to produce at that place and time the following papers and other items:

None

The witness is commanded to continue in attendance from day to day until discharged.

Herein fail not, but have you this writ in due time before the Chief Clerk of the House of Representatives with your return thereon showing how you executed it.

Given under my hand this 15th day of July, 1977.

Speaker of the House of Representatives

OFFICER'S RETURN

Came to hand on the 15th day of July, 1977, at _____ m. o'clock, by delivering this subpoena to Martin Jay Riekenberg the witness named in it, at _____ in Travis County, Texas.

Name of officer

Title of officer

Proponent 16
C.V. 7-15-77

The State of Texas

Office of the Lieutenant Governor

Austin

July 13, 1977

(Rec'd 11:05' AM 7-13-77)

Dear Ms. Murray:

In accordance with the procedures outlined in House Concurrent Resolution 2 as passed by the 65th Legislative Session, First Called Session, I hereby appoint Senator Ray Farabee to be Chairman of the Committee of the Whole Senate under the terms of that House Concurrent Resolution.

Sincerely,

/s/W. P. Hobby

Ms. Betty Murray
Chief Clerk
House of Representatives
State Capitol
Austin, Texas

July 12, 1977

Ms. Betty King
Secretary of the Senate

Ms. Betty Murray
Chief Clerk of the House

Pursuant to the provisions of **H.C.R. 2** we appoint the following as Counsel for the Proponents:

Adams,
Hance,
Jones of Harris
ON THE PART OF THE SENATE,

and

Maloney,
Nabers,
Grant
ON THE PART OF THE HOUSE.

Representative Maloney is designated as Chief Counsel.

/s/William P. Hobby
President of the Senate

/s/Bill Clayton
Speaker of the House

cc: Ms. Margrette Vollers,
Journal Clerk, Senate

Ms. Jeanette Burk,
Journal Clerk, House

Mr. Waggoner Carr,
Attorney for Respondent

FILED JULY 13, 1977
9:50 a.m.

DONALD F. NOBLES

ATTORNEY AT LAW
305 STOKES BUILDING
314 WEST 11th
AUSTIN, TEXAS 78701
(512) 472-5543

July 13, 1977

Honorable William Hobby
Lieutenant Governor
State of Texas
Capitol Station
Austin, Texas 78711

Honorable Bill Clayton
Speaker of the House
State of Texas
Capitol Station
Austin, Texas 78711

Gentlemen:

As attorney for the Honorable Donald B. Yarbrough, I demand an immediate hearing on all pre-hearing motions heretofore filed pursuant to **H.C.R. 2.**

Gentlemen, it is less than forty-eight (48) hours until we are scheduled to go to hearing. Unless we have an immediate hearing, there is no conceivable way that a pre-hearing motion for discovery can have any meaning.

Cordially yours,

/s/Donald F. Nobles

/s/Waggoner Carr

HOUSE OF REPRESENTATIVES
AUSTIN

(Proponent's 3
ege 7/15/77)

July 15, 1977

STATE OF TEXAS

COUNTY OF TRAVIS

I, BETTY MURRAY, Chief Clerk of the House of Representatives, do hereby certify that the attached page(s) represent(s) a true and correct copy of Letter from Waggoner Carr and Donald F. Nobles requesting an immediate hearing on all pre-hearing motions filed pursuant to H.C.R. 2, filed in this office on July 13, 1977.

/s/Betty Murray
Chief Clerk
House of Representatives

The Senate of
The State of Texas
Austin 78711

July 13, 1977

Mr. Waggoner Carr
Mr. Donald F. Nobles
Mr. Bob Blinderman
Attorneys at Law
Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701

Gentlemen:

Lieutenant Governor William P. Hobby has appointed me to serve as Chairman of the Committee of the Whole Senate under the terms of House Concurrent Resolution 2.

The Lt. Governor delivered to me your letter of July 13, 1977 requesting immediate hearing on all pre-hearing motions filed pursuant to House Concurrent Resolution 2.

This letter will serve as written notice that a hearing on such motions has been set to occur this day, Wednesday, July 13, 1977 at 8:00 p.m. in Room 300, State Capitol, Austin, Texas. At the same time, I will consider the motion by proponents to quash the subpoena of the 181 members of the 65th Legislature and Lt. Governor and motion by Davis Grant to quash the subpoena duces tecum of Grant and records referred to in such subpoena.

By carbon copy of this letter, I am advising the Chief Counsel for the proponents of the time and place for this hearing.

Sincerely,

/s/Ray Farabee

RF/jt

cc: Honorable William P. Hobby
Honorable Bill Clayton
Honorable Robert Maloney
Honorable L. DeWitt Hale, Chairman of
Committee of the Whole House

The Senate of
The State of Texas
Austin 78711

July 13, 1977

Mr. Waggoner Carr
Mr. Donald F. Nobles
Mr. Bob Blinderman
Attorneys at Law
Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701

Gentlemen:

This is to confirm in writing the information my office relayed by telephone to Mr. Carr concerning the place of tonight's hearing; the hearing will be held in Room 310 of the State Capitol rather than in Room 300, as previously indicated.

Pursuant to your request, enclosed are copies of the motion to quash the subpoena of the 181 members of the Legislature and Lt. Governor Bill Hobby and the motion to quash the subpoena of Davis Grant.

Sincerely,

/s/Ray Farabee

RF/jt

Enclosures

cc: Honorable William P. Hobby
Honorable Bill Clayton
Honorable Robert Maloney
Honorable DeWitt Hale

PREHEARING CONFERENCE

July 13, 1977

CHAIRMAN FARABEE: I call the prehearing conference to order. I'm Ray Farabee. I'm a member of the State Senate. This morning, I was appointed as Chairman of the Committee of the Whole Senate under the terms of the House Concurrent Resolution 2.

I would like to introduce to you at this time Representative L. DeWitt Hale of Corpus Christi, who has been appointed Chairman of the Committee of the Whole House under the terms of that House Concurrent Resolution. Under the terms of the rules, the Chairman of the Committee of the Whole Senate serves as the presiding officer in certain joint proceedings and is authorized under those rules to make rulings on motions.

At the time I was appointed this morning, I was advised by Lieutenant Governor Hobby of requests by Attorney Waggoner Carr and Attorney Don Nobles, representing Judge Yarbrough for a hearing in advance of the hearing scheduled on Friday on motions that they filed pursuant to HCR 2. And in response to that request, I set this hearing tonight at 8 o'clock at this time and place to hear those motions. At this time, I would like to introduce counsel for the proponents who are present, Mr. Bob Maloney, who is chief counsel for the proponents; Mr. Don Adams, Mr. Gene Jones, Mr. Kent Hance, Mr. Lynn Nabers and Mr. Ben Grant.

I'd like to introduce at this time counsel for respondent, Judge Yarbrough, the Honorale Waggoner Carr, and Don Nobles.

I would say in advance that this is not a judicial procedure, it is a legislative constitutional procedure. In order to afford due process, we will seek to dispose of certain motions that are made. We will allow a hearing on those motions and arguments and presentation by each side. The procedure that I have advised in advance of calling this meeting to order, to both sides of the proceeding, would be that the proponent of any motion would present that motion, then each side would have an oportunity to make arguments contrary to the persons making such a motion, and then the persons making the motion will have an opportunity to close.

As a courtesy to some of the parties that may not be directly involved in the legislative process, I determined that we would first take up several motions to quash subpoena, and the first motion I would lay out would be the motion to quash subpoena that was issued and served upon Davis Grant. And Mr. Dan Moody, Jr., representing Mr. Grant, is here and I'll ask him to come forward and to present that motion.

I would also state that this is in the nature of a prehearing conference that it will be, to some degree informal, so that, particularly for those of you at the counsel table, if you prefer to make your presentation at the counsel table, you may do so; if you prefer to stand and make it at the rostrum here, you may do so.

Mr. Moody.

MOODY: Thank you, Mr. Chairman. As you have stated, this is a — the motion I am presenting is a motion to quash the subpoena served on Davis Grant, who holds the position of General Counsel of the State Bar of Texas. This motion is directed at a subpoena served on him on July 13, asking that he produce certain documents, papers, tapes and memorandums.

This matter pertains to the question of whether or not Mr. Grant should be required to present evidence, material in evidence, that came to him as a direct result and incident to his employment as an attorney by the Grievance Committee of District 4-F of the State Bar in a proceeding styled The State of Texas vs. Donald B. Yarbrough, pending in the 113th Judicial District Court of Harris County. The subpoena seeks from him material which came to him as the result of that employment. And as I'm sure the chairman and others present are well aware, although, as the chairman has said, this is not particularly a judicial proceeding,

there is nevertheless ingrained in our law a considerable body of rules and statutes that restrict the right of an attorney to give evidence and testify. The object of many of those rules is to keep the attorney, I guess, in his place, which is at the attorney's table and not in the witness chair or appearing as a party. And, of course, in recognition of that principle is the reason that I am here representing Mr. Grant. He asked me today to come and appear on his behalf rather than appear for himself. And, there are among the rules, of course, that prevent that, there are rules that — Canons of Ethics — that say an attorney may not accept employment in a matter in which he knows that he is to be a witness. It's against the Canons of Ethics. Likewise, we have rules of privilege, and rules pertaining to work product. It is our opinion, and our motion is based on that, it is our opinion that this subpoena seeks — flies in the face of the privilege between attorney and client.

Mr. Grant came by most of this information or perhaps all of it, all of it as the result of his employment, most of it as the result of attorney-client communications, and/or the work product. The work that he did preparing, or those under him, and much of the material is actually, perhaps, directly prepared by or worked on by one of his subordinate attorneys, but we are accepting the subpoena as being directed to Mr. Grant, including whatever might be in his possession either as the result of the work he did directly or one of the attorneys on his staff working for the grievance committee.

So we think, we feel, we urge upon this committee, that the subpoena should be quashed, that should recognize the legal process, which this is certainly a part, albeit a legislative part, is not simply a matter of expediency but also of honoring rules. It may be expedient for Justice Yarbrough and his attorney Mr. Carr to seek this material from Mr. Grant, who has it collected and that sort of thing, but that's not the way it's got to be gotten. He's going to have to get it, I think, from the original parties that had it, perhaps the clients, or from other sources, available from other sources, most of it, some of it may not be insofar as the work product of Mr. Grant, but we feel that proper approach for this committee to take is the same approach that would be taken in the court of law to honor the attorney-client privilege, and I might state that Mr. Grant has been directly authorized and requested to assert that privilege on behalf of his client, the District 4-F Grievance Committee.

And it is asserted, also, some of it is work product material which has been put together in preparation for that proceeding. And we feel that the subpoena should be quashed, that he should not be required to present this material. I understand, incidently, that one of the items mentioned is some audio tapes, which might be an exception to what I am having to say, but it's my understanding that a copy of those tapes has been made and either has already been furnished to Mr. Carr or will be within the next few hours by sometime tomorrow. So, that should render that particular aspect of it moot. As to all the rest, documents, memorandums, letters and correspondence pertaining to this matter, we feel that the privilege applies as well as the work product exception.

If the committee does not see fit to treat the matter on that basis, then we would ask in the alternative that the material, if we are required to produce it, that the material be inspected in camera by the chairman or such portion of the committee as he might designate to determine what part of it might be subject to — if the subpoena is not quashed in its entirety. But the material...we'll...under the order of the committee, we will submit them. And we will ask though, that they first be inspected in camera to determine whether or not, to the extent necessary, the inspection of the documents would determine that they are subject to either privilege or work product considerations.

And I would like to close and say that it should be — I think it is obvious — that Mr. Grant is not personally involved in this, and it's not a question as to

whether Mr. Grant wants to submit this material or not, but whether he should, and I think he should not, because of the attorney-client and work product considerations. It will make it a violation of his duty as an attorney to his client to make this available, and so, therefore, he would so only under, but he will do so, of course, under direct orders of this committee.

Thank you, Mr. Chairman.

FARABEE: Do you have the subpoena there?

MOODY: Yes, sir.

FARABEE: May I examine it please?

MOODY: Mr. Chairman, I might say this does not seem to be a proceeding for the taking of evidence, but I would represent to the chairman that if called to testify, and he is available here, Mr. Grant would testify that these matters are matters generated either as attorney-client communications and/or, work product material. That's what he has.

FARABEE: In what proceeding, specifically, does he have any such material, anything to do with this proceeding?

MOODY: Not directly out of this proceeding, Mr. Chairman, but out of the proceedings that I mentioned, the suit The State of Texas vs. Donald B. Yarbrough, pending in the 113th Judicial District Court in Harris County.

FARABEE: Does any of the material that is subpoenaed come into his possession in any proceeding, or any manner other than through the court proceeding in Harris County?

MOODY: Well, it all came in connection, as I understand it, with the court proceeding. You say "through the court proceedings." I don't think it all came "through the court proceedings," in that some of it is work product incident to that litigation but not being introduced into evidence or provided in a court proceeding. I think most of it was not provided in that fashion.

FARABEE: But it was gathered in connection with those proceedings.

MOODY: Gathered in connection with the proceedings, yes, sir. As I say, Mr. Grant is here to testify if that is deemed appropriate. I'm representing to you what he has told me and my understanding of it. I believe all of that to be correct. But he is here to testify if that is deemed appropriate by the chairman of the committee.

FARABEE: Mr. Grant, you are here, and you would confirm what has been represented?

GRANT: Yes, Mr. Chairman.

FARABEE: Thank you. I have no further questions. Mr. Carr.

MOODY: Thank you.

CARR: Mr. Chairman, I will remind this committee that the right to subpoena material from which we are required to develop the defense of Judge Yarbrough was granted to us only 24 hours ago. We hurriedly got subpoenas out because you fellows want to go to trial 24 hours from now. And every time we've gotten subpoenaes out, those subpoenaes have been resisted. Nobody wants to give us anything. Now, here we have on this case the Bar of Texas. The Bar of Texas has adopted the very things that you are trying to try Friday. They have documents, they have tapes, they have everything they think they need, and they are supplying it only to you, and they deny us the right to see what they are letting you see. And we have only 24 hours to get ready. Now, you have answered it — your own lawyers have answered his questions. And I quote from the proponent's argument against our motion for production of discovery of items in which they say, and I quote, "The manner in which a party may procure production of a tangible item in an ordinary, civil and criminal proceeding is not applicable to this proceeding because Rule 13, House Concurrent Resolution No. 2, prescribes the rule applicable to this proceeding on this matter".

That rule states, and they quote, "Counsel for the proponents or the respondent are entitled to have process issued to require the production of papers and other items that are relevant and material to the issue before this joint meeting."

Now, I say to you that if you all are going to force us to trial, somebody has not go give somewhere and let us see some evidence. Existing attorney-client relationship, they claim. He represents the Grievance Committee, he says. The Grievance Committee is a State Agency, it's a part of a state agency. The government is keeping us from getting the material we need to defend Judge Yarbrough on the charges that you fellows are going to try him in 24 hours on. It just seems that there is a basic fairness to this somewhere and we are being denied it. And this is why we ask the State Bar, the representative of the State Bar, to at least let us see the documents and the tapes that he has and he resists it.

Now, I can't see where documents are work products. I have never heard of that before. I'll admit maybe some, as it says here, memorandums, could be, letters could be or correspondence could be, and he admits maybe audio tapes might not be, but I want to tell him that if he is under the idea that anybody has given us any tapes, he's wrong. Those tapes have been withheld from us, and the only people that have them are you and the government. And we demand to see them. Now, I don't care whether we get them from the State Bar or whether we get them from you or whether we get them from Ronnie Earle, if he has them, or I don't care if we get them from Rothkopf, but we have a right to them. That's why we are very serious about this. You all want to try this case and get home. You're not giving us time now to prepare, but we're trying to meet your rules, but every time we try to get something that will let us do our job and protect the citizens' constitutional rights we run into this kind of stuff.

Now, if they want to have you look at it in camera, all right, look at it in camera. But we have only 24 hours and all of these delaying processes are depriving us of our rights. I don't know, I have an idea that there might be something — he said I'm on a fishing expedition, or somebody said it over here, he might have something that's exculpatory toward my client, and he's hiding it if he does. And I tell you that if we're going to practice on a 24 hour lawsuit here where that's all the time we have to get going, let's go. We're not playing games. We're going after a man's rights. We're trying to destroy his future. Whatever we're trying to do that's the game that we're playing and it's serious.

Now, I don't care if you want to look at it first, look at it. But lets get going, and that's all I can say to you. We're at your mercy. We're at the government's mercy. We don't have any power. We had only power to subpoena 24 hours ago and here we are tonight and nobody's given us anything. I say to you that there are

basic rights here, that we ought to quit playing games and let's get going on what's right, and I'll leave it up to you whether we get it or not or where we get it from. We can't be ready 24 hours from now if we don't get the evidence that we have a right to see, and that's your job.

FARABEE: Mr. Carr, while you are standing there — you referred to "all audio tapes and documents". Could you be any more explicit as to what you are referring to in the way of specific documents and specific audio tapes?

CARR: I haven't seen his file in the first place, but I would say, obviously, the State Bar has the tapes that the man with a sack over his head brought up here. At least the district attorney in Houston said that he had them and that he gave them to Davis Grant. I don't care where we find these things. I'm just trying to find who's got it, and I haven't been able to find it yet, and it hasn't been given to me. Of course I want to see those tapes. I don't see why I can't see those tapes and read them and hear them, just like everybody else. They might have something in there that would be very important to me. By George, I haven't gotten them. Now, that's what I want there, particularly. I want any other documents, memorandums, letters, or correspondence he has pertaining to Donald Yarbrough and the subject matter upon which Donald Yarbrough is going to have to stand up before a joint session 24 hours from now and defend himself.

MALONEY: Mr. Chairman, if I could interrupt.

FARABEE: I asked a specific question. Did you have any other response to my question?

CARR: That's all, that's all.

FARBEE: If not, I'd recognize Mr. Maloney.

MALONEY: Mr. Chairman, Mr. Carr has filed a discovery motion against the House of Representatives and the Senate, the joint committee, which will be heard later, and it is our intention at that time to turn over to Mr. Carr tapes that he is seeking, and perhaps will solve some of his problems.

FARABEE: In connection with this subpoena, in other words, you are advising that at that time you intend to tender or set a specific time that you will tender all tapes that you intend to use at the proceedings?

MALONEY: Yes, sir. I have them present to be turned over to him.

FARABEE: All right. And what about documents, memorandums, letters or correspondence pertaining to Donald B. Yarbrough from the State Bar files which you intend to use?

MALONEY: I have never seen the State Bar files. All I can say is tape recordings, copies of grand jury testimony...we will provide him with the transcripts that we have at this time. There are transcripts of the tapes, as far as we have been able to progress at this time, and as we get more we will provide him with more. In that regard, I did want to point out to the chairman that these tapes will be available if that is what Mr. Carr's motion is aimed at.

FARABEE: Are there any documents that you have secured from Mr. Grant or copies of any documents that you may have secured from Mr. Grant that you intend to use at the time of the proceedings Friday morning?

MALONEY: Yes, sir. These tapes. These are not the originals. We intend to introduce the originals. These are copies which are the only things available at this time.

FARABEE: By documents, I mean written documents —

MALONEY: These are dubs from the tapes.

FARABEE: Any specific written documents other than the tapes that you may have secured from Mr. Grant that you intend to use at the hearing?

MALONEY: No, sir.

FARABEE: All right. And do you have any specific written memorandums, letters, correspondence that you may have secured from Mr. Grant that you intend to use?

MALONEY: No, sir.

CARR: Mr. Chairman, it's relatively insignificant to me whether the state intends to use them or not. I don't have any idea that the state's going to use anything that will help me, and so — I honor Mr. Maloney, and I know him to be a good man, but I don't trust him for finding things good for me. I want to know what the State Bar has, and I don't want the State Bar telling me that they don't have anything good for me. Until perhaps, you look at it.

FARABEE: As to the motion to quash the subpoena that was issued to Davis Grant, which was a subpoena duces tecum covering all audio tapes, documents, memorandums, letters or correspondence pertaining to Donald B. Yarbrough and the subject matter of HCR No. 1 and SCR No. 1, the chairman would respectfully grant the motion to quash the subpoena except as to all audio tapes, and for that matter, any other documents, memorandums, or letters which may be presented to the joint hearing of the Committee of the Whole of the House and of the Senate. But otherwise, the motion to quash the subpoena duces tecum is granted.

ADAMS: Mr. Chairman, are you putting the burden on the representatives of the proponents to provide this? Is that what the ruling is?

FARABEE: Yes. To provide, from representations that have been made here, the tapes you intend to use, you intend to make them available here. I'm stating that if there are other written documents that you may have secured from Mr. Grant that you intend to use at the time of the hearing, that those should be made available for inspection.

ADAMS: Thank you.

CARR: Mr. Chairman, am I to understand that what we're getting here is the audio tapes that the prosecution has and then just whatever they intend to use?

FARABEE: That's correct. Apparently there are other proceedings concerning Judge Yarbrough. It is not the purpose of this proceeding to go into those matters and to disturb those proceedings. They must proceed along the statutory lines or the constitutional lines or whatever other lines of civil or criminal law that they have been filed under. And we will proceed only under the constitutional provision of address. And the matters of concern here are the matters that are anticipated to be presented by way of evidence at the joint hearing before the Committee of the Whole House and the Committee of the Whole Senate.

CARR: So all we're getting is what the prosecutors think helps them?

FARABEE: No, I would say that what you are getting here are the things that involve this proceeding. The things that involve other proceedings, if they are available to you through subpoena, deposition, other means of discovery, then they should be pursued in those proceedings and not in this proceeding.

CARR: Then, may I ask, sir, if the state, if the prosecutor, has had the freedom of looking through his files and picking out what the prosecutor wants, why am I as defense counsel being denied the right to do what the prosecutor does. This puts me in the position of accepting only what the prosecutor got out of the State Bar files that they think will help the prosecution.

FARABEE: I would merely observe that if you have the right to those documents, it would be in that proceeding through a motion for discovery, through deposition, or otherwise. If in fact, it is a work product, other matters that traditionally are not available in civil, criminal or other types proceeding, then those rules should govern. But I am making a rule as to this proceeding that the motion to quash the subpoena is granted with the understanding that the audio tapes and any documents that the proponents intend to use will be produced.

CARR: All right, sir, then for the record, sir, with all respect to the chairman, I want to add that as a ground for further continuance because I cannot possibly follow the privilege you're giving me here in 24 hours. So, I am effectively being denied anything out of the State Bar headquarters that could possibly help me defend Judge Yarbrough.

FARABEE: All right. The next motion will be the motion by District Attorney Ronnie Earle to quash the subpoena. Mr. Earle.

EARLE: Thank you, Mr. Chairman. My name is Ronald Earle. I am district attorney of Travis County, Texas, and I am appearing this evening before you in the capacity as movant on the motion, copies of which I believe have been distributed, to quash the subpoena that was today served on me. The subpoena did not require me to produce any documents, any materials, merely to appear and continue in attendance in the proceedings to begin on July 15th at 9 a.m.

In support of the motion to quash the subpoena, I would say that I am not a witness and have not been a witness to any material fact in issue in this case, and that the only knowledge that I have of the facts in this case constitute the work product for the Travis County district attorney's office, and my office is responsible for the prosecution of Cause No. 53180 and Cause No. 53181, styled The State of Texas vs. Donald B. Yarbrough, presently pending in the 147th Judicial District Court of Travis County, Texas.

In short, the only knowledge that I have of any of the matters that will be considered on Friday is not direct personal knowledge and is work product. On that

ground, on those grounds, Mr. Chairman, I would respectfully move that the subpoena requiring my attendance at these proceedings continually be quashed.

FARABEE: Do you have a copy of the subpoena?

EARLE: Yes, I do, Mr. Chairman.

FARABEE: Mr. Carr.

CARR: Mr. Chairman, all due regard to my good friend, the district attorney, but I've never heard of a man come up before a committee, a court, and expect to be excused because he says "I don't know anything" and that "I'm not a material witness." I don't think I have to come before this committee and tell you ahead of time what my strategy is in defending Judge Yarbrough. I don't think I have to tell you every question I'm going to ask Mr. Earle ahead of time in order to have him subpoenaed to come to the hearing. If you're going to make me tell every question I intend to ask any of my witnesses before I can get them up here, I'll say you're riding pretty high. That's not done in any court, and it's not to be done in this legislature. I have the right to subpoena anybody that I want to and use them the way I want to without asking you whether I could do it or not.

FARABEE: Subject, of course, to evidentiary objections that might not have relevance in other matters, but we won't know those until the time of the hearing.

CARR: Of course, but that comes at the time of hearing, Mr. Chairman.

FARABEE: This is not a subpoena duces tecum.

CARR: No, sir.

FARABEE: In examining it, you're not asking him to produce anything in any criminal proceedings or whatever.

CARR: No, sir. I just want him there. I've got some things I'd like to ask him and I don't think I have to tell you or him this day what I'm going to ask him on Friday in order to have him subpoenaed under the authority of the state to be a witness. I didn't say he was going to be a friendly witness, didn't say he was going to be an adverse witness, but I want him there as a witness and nobody can deny me the right to have witnesses in behalf of my defense, and that's exactly what's being attempted here. I object to it, it's out of order, and I ask the chairman to deny this motion for it.

FARABEE: Mr. Maloney, do you have any comments or response in connection with this motion?

MALONEY: No, Mr. Chairman.

FARABEE: Mr. Earle, would you like to close on this motion?

EARLE: As far as comments, Mr. Chairman, and I'll direct this comment at you, too, General Carr, I am quite willing to appear as a witness if you wish to have me subpoenaed. My concern is that the language of the subpoena commands my attendance at proceedings continually. And unfortunately, Mr. Chairman, the

two cause numbers, the two cases to which I referred in my earlier remarks in support of my motion to quash the subpoena, are not the only two criminal cases pending in Travis County. I have a number of other matters to attend to. I'll be happy to come and testify if I am notified as to the time my presence is desired. My concern is, basically, being in attendance continually in neglect of my other duties.

FARABEE: Mr. Carr, do you have a response to that in connection with...

CARR: I never had any dispute over that. If he had asked that in the first place, we could have worked it out. He's right across the street from me and we talk to each other on the telephone. I don't have any difficulty that way. I don't want him sitting around. It makes me nervous to have a district attorney sitting around. I'll be glad to call him just before we need him and let him go back, Ronnie, after that, certainly. I realize that you have your responsibility and I want to cooperate.

EARLE: Thank you. I will await your telephone call. May I be excused, Mr. Chairman?

FARABEE: Let me make a ruling on this motion to quash. With the understanding that the chair will have the right to excuse the witness until he is needed or a reasonable time in advance that he might be present, and, of course, any rulings as to the propriety of questions or answers made at that time, the motion to quash the subpoena is denied.

EARLE: May I be excused?

FARABEE: Yes, you may.

The next motion to quash subpoena in advance is filed by the proponents and signed by Mr. Maloney and involves the subpoenaes to the 182 members of the House and Senate and Lieutenant Governor. Mr. Maloney to present that motion.

MALONEY: Mr. Chairman, as you have stated, Mr. Carr has subpoenaed on behalf of the respondent in this cause 181 members of the legislature and the Lieutenant Governor. This constitutes basically and entirely both Committees of the Whole which will be hearing this matter. I would ask you to recognize that Rule 13 of HCR No. 2, where it gives the Speaker the power and both sides the power to subpoena witnesses and documents requires that the production of the witnesses and the documents and the papers must be relevant and material to the cause. Although this is not a trial, it is a hearing, we may equate with this what would happen if this were the same type of process that you allowed in all types of cases. Every time a jury panel was set up in a trial, you would simply take you jury list and subpoena the jury panel. Then, they become witnesses, which is a disqualification as a juror, and you just say "Send up another jury panel." Certainly, the whole theory of being able to contest a subpoena is to prevent the abuse of this process. It is our contention that this is simply exactly what Mr. Carr is attempting to do and is on some type of fishing expedition. He has shown, and I think he should be required to show, that any witness that he subpoenaes, whether it be a member of the legislature or any other witness who does not desire to spend the time down here waiting to possibly be called, that he should show the relevance and the materiality or a reasonable expectation of what — that that witness has some personal knowledge that he is going to be able to bring forward to the committees of the legislature concerning the allegations that are in HCR No. 1. To simply just say that to give the power of subpoena to anyone whom he may wish to subpoena including all members who may be selected to sit and hear this matter, I think, is an abuse of

process and for that reason I think that the 182 subpoenaes that are issued to the members of the legislature and the Lieutenant Governor should be quashed.

FARABEE: I haven't observed yet...do you have a copy of the subpoena?

MALONEY: Do I have a copy of the subpoenaes? Not at this time.

CARR: We have a few extras.

FARABEE: Do you have any comments? Have you seen one of the subpoenaes?

MALONEY: No, sir. I have not seen them personally.

FARABEE: I have an inquiry: Are all of these the same except for the different members of the legislature?

CARR: They are identical except for...

FARABEE: And it includes all records, documents, letters, memorandums, communications, recordings — tapes, I guess — pertaining to Donald B. Yarbrough.

FARABEE: Any other comments?

MALONEY: No, sir. I would point out to the chair that in an address, the constitution does not even provide for subpoena power, it sets out no procedures whatsoever, other than that the respondent would be able to appear and tell his side of the story as regards the allegations. What we have provided in HCR No. 2 is the subpoena power, so that in all due process, he would have the power to obtain that evidence which is necessary and reasonable in his defense or to explain the charges against him. We do not feel — and at least I can say for myself — it was certainly not my intention in voting for this resolution that, in giving the power, it was subsequently then to be abused.

FARABEE: Mr. Carr.

CARR: Mr. Chairman, I will say that under the accusation here that my attempt here is to abuse the process of subpoena, I would like to retort that if I had had that in mind, I probably would have subpoenaed as witnesses all the members of the House and Senate and put them under the rule and had them stand out in the hall where they couldn't hear anything and then we would have proceeded with the hearing. But I wasn't going to do that...couldn't have anyway. I am just being a little facetious right now.

FARABEE: You are willing to stipulate that?

CARR: Yes, sir, I will stipulate that.

Mr. Chairman, we are not trying to pull any tricks here in any way whatsoever. I will be quite frank with the committee or with the chairman that what we are trying to do here is not to cause anybody to stand around and waste time and hang up the legislature and its proceedings. As a matter of fact, that is why we put this in the words we did; to appear before the Chairman of the Whole House and the committee of the Whole Senate instanter, and to produce all records, documents,

letters,. memorandums, communications, and tapes pertaining to Donald B. Yarbrough.

And as I recall at the time that we were meeting with the prosecutors and with the Speaker of the House, it was explained that all we wanted was those files out of — those papers out of those files. And we are not putting all of the members of the House and Senate on the stand as witnesses. But now that is being resisted, so I would like to say to you that we are not on a fishing expedition. What we are trying to do is get the same rights in substantial degree, that we would have in a civil or criminal case in this state, and that is, we would have the undeniable right to question and to explore, in whatever legal way we could, the possible bias or prejudice of the jury. And we are not trying to disqualify anybody per se, but what I am trying to avoid is exactly what I read in the paper the other day, if I might say so, where some of your own members said that a whole bunch of you had already made up your mind; and if that is true, I want to know it, because if a majority or two-thirds of the members of the House and Senate have already decided that Mr. Yarbrough ought to be moved out without ever hearing any evidence, let's not have any hearing Friday. I have got some other things I would like to do like Ronnie Earle. Now I think I have a right, and I propose it here as a part of the motion to have a voir dire, I have a right to examine the jury that is going to decide the fate of Judge Yarbrough, and to determine whether they are prejudiced, biased, have a fixed opinion, or have already convicted him, because my client has a constitutional right to a fair trial, and I keep hearing fair trial, fair trial, here. I don't care what you do for us in the way of procedure or whether you let me have Davis Grant's records. If you still give me a loaded jury and deny me the right to determine whether I have a jury that has already decided in...adversely to me, you have denied me every essence of a fair trial.

Now, I am not playing games. This is a serious thing. And so I want to be able to subpoena, and all I am asking for is anything that is in the files of the legislators pertaining to Donald B. Yarbrough. And that's all. I am not interested in what they promised to get elected or whether they got elected by a thousand votes, I am not interested in... All I want to know is, who have they been contacted — who has a jury been contacted by that should not have been doing the contacting in order to influence their votes, and I want to know whether they answered those people who have written to them, like Ralph Yarborough, and tried to influence the jury's vote. I want to know whether they committed themselves by return letter. Now, if you deny me the right to even inquire into the bias or prejudice or fairness of my jury, you have denied me due process. Due process is guaranteed to me by the Federal Constitution, just like it is guaranteed to you. And all of you lawyers know that if you weren't able — if you weren't able to examine the fairness of a jury, you could get the case reversed in a minute. But the trouble is, I don't know where I am going to reverse you fellows, and if I reverse you, then the damage has been done because there is no way for you to put Judge Yarbrough back in the seat you took away from him in the first place.

And so I am going to stop. I am not going to make any more jury argument to you, but I am trying to show you that we are not trying to take advantage of anybody. We simply want to know, are we going to get a fair trial or not? And I don't trust Mr. Chairman, in all respect to you, you telling me I am going to get a fair trial; or Mr. Maloney telling me I am going to get a fair trial. I want to know myself by my constitutional rights that I am going to get a fair trial for my client. No more, no less. And that is all I seek here. I do not seek to arrest any of you, as this charges. It's ridiculous. I do not seek a back door attempt to provide for a prehearing voir dire examination of each member of the committee. I am going through the front door, and I am going to confront you with it. I don't care what door I guess I have to go through, or whatever. But anyway...

FARABEE: Is there any other materiality other than your interest in voir dire qualifying members of the legislature?

CARR: In getting this?

FARABEE: In issuing these subpoenas?

CARR: No, sir.

FARABEE: That's it?

CARR: That's it. That is all I want. I just want to know what commitments they have against my client. And if they don't have any, I am happy. But I think I have the right to know. Thank you, sir.

MALONEY: Mr. Chairman, at the outset, I would like to at least clear up our stand in this matter. This is not a trial, and the fact that Mr. Carr continues to call it a trial doesn't make it a trial. It is a hearing. The constitution does not even require the production of evidence at this matter. It simply states that the respondent would be notified of what the charges against him were and that he would be entitled to be heard on those charges before any vote of the legislature. What we have done is added due process into this proceeding because we feel that it would be unfair for him to have evidence introduced against him without any rules for him to go by. But these rules were not added simply for him to be able to abuse. What we have added the subpoena power for him is so that if there is any evidence that he cannot obtain on his own hook, that the legislature of the State of Texas is going to provide that for him, as long as it is relative and material to the charges before us. Mr. Carr has admitted that he does not know of any member of the legislature that does have evidence against his client, or in favor of his client, but that he simply wants to ask in case they might or might not, and I think that is an abuse of process and respectfully ask the chair to quash the subpoenaes.

FARABEE: All right. In connection with this motion to quash the subpoenaes, I am granting that motion to quash the subpoenaes and again to make the observation that the proceeding here is not a jury trial, and this proceeding which has been authorized in our present Constitution for more than a hundred years, the legislature is not a jury; that in matters where there are trials heard by a judge, bias, alone, is not grounds for disqualification. And that constitutionally, the legislature does have the authority, and in fact, the duty to proceed under this provision. And, therefore, the motion to quash the 182 subpoenas of the members of the House and members of the Senate, and the Lieutenant Governor, is granted.

We will now move to a series of motions that have been filed by the attorneys for Judge Yarbrough. There are two of these motions which I would state in advance, as I advised them in advance, that, under the rules, it is my feeling that action would be properly taken by the respective houses by a vote in the sense that one is a motion to postpone, and the rules clearly call on a motion for a postponement, that that would be a vote and determination be made by the respective committees of the whole. The second motion by the attorneys for Judge Yarbrough that's very similar and would have the same effect as a motion to abate, which would have the effect of postponing the proceedings, and, therefore, the decision on that under the rules must be made by a vote of the respective houses...

ADAMS: Mr. Chairman.

FARABEE: Yes.

ADAMS: If it might be permitted by the chair, I would like to have an opportunity to respectfully disagree with the chair in regards to the motion of abatement. I would like to be heard in regard to that disagreement.

FARABEE: That's all right.

ADAMS: At the proper time.

FARABEE: We will proceed, then, on that at this time.

ADAMS: Mr. Chairman, the motion that you are referring to is entitled, or at least it seeks the relief of abatement of the addressed proceedings. Mr. Chairman, the office of abatement is — has traditionally been one that has been used as a procedural matter in one court to prevent proceedings in another court on the same issues, I suppose and feel, to avoid the duplication of litigation and the possible different results that two different courts trying the same issues might reach. And I would respectfully disagree with the chair that this is a motion to postpone because Mr. Carr, in his motion, alleges essentially that there are two trials going on: one a criminal trial where criminal allegations and indictments have been rendered and alleged against his client, Mr. Yarbrough, and that those same processes are being tried — or same issues are being tried — by the legislature in addressed proceedings. First of all, and I think the chair is completely and immanently correct, that this is not a trial before the legislature. Secondly, I would like to point out to the chair, Mr. Chairman, that the issues before the legislature, sitting as a committee of the whole and proceeding on a resolution of addressment, it is not a proceeding on the criminal issues themselves. The final and end result of the issues in connection with this resolution is whether or not Donald B. Yarbrough is qualified and permitted to sit on the bench and continue to sit on the bench whenever he's been — Whenever there's been allegations made against him which fall within those provisions of the constitution in Section 15. The proceeding of address is not criminal in nature in any way. There is no criminal penalty which can attach to Mr. Yarbrough should the legislature vote by two-thirds to address the Governor to remove Mr. Yarbrough. The ultimate issue is whether or not the Judge is fit to continue to serve because of his conduct as prescribed again by Section 15 of the Texas Constitution.

Mr. Chairman, this is an abatement and nothing more. It is not a motion for continuance. The motion for continuance is clear and on its face and filed before this chair and filed before this committee, and I would like to urge the chair to consider this motion on its merits as a legal motion to prevent a duplication of trials on the same issues, and I would respectfully request the chair to proceed to hear this motion.

CARR: Mr. Chairman, I agree with the original decision of the chair. I think that this is a proper subject for every member of the House and Senate to decide sitting as a committee; not this chairman. I think this is a basic matter, and so I would like to see your original thought — I'd like to see you stand on that, and let's just argue it out down there and give the members themselves a say-so on whether they want to have the hearing or don't, rather than you saying we shall not hear it or we shall have a hearing. Let the members themselves decide it, and that's what we are asking.

FARABEE: Mr. Carr just...(Remarks inaudible)

CARR: Of course, the purpose of our asking for a postponement was that we simply do not have enough time to get ready. You have got too short a fuse on this. Secondly, we are asking that you abate this because you have charged Judge Yarbrough with committing a criminal offense. Now I don't care what counsel on the other side said, we are dealing in semantics. I read this and I am reading it directly, Mr. Chairman, House Concurrent Resolution No. 1, in which paragraph 1 says, quote, "That on June 28th, 1977, he committed the offense of aggravated perjury." And you have to prove, according to your rules, that beyond a reasonable doubt, Judge Yarbrough did commit the offense of aggravated perjury because you have alleged it.

Paragraph 2, "that on or about May 16, 1977, he committed the offense of forgery." Quote. And you have to prove that he committed the offense of forgery.

Paragraph 3, "that on numerous occasions in the months of May and June, 1977, he planned and solicited commission of the offense of capital murder." You are charging him with a criminal offense on all three matters, and you have to prove it because you have alleged it. Now, what you've done is take two indictments, two trials that are going to take weeks to try over here in the Travis County Courthouse, you have put them all into one resolution and I have heard the Speaker say you are going to take a day to try. Oh, I forgot, this is a hearing, it is not a trial, and I don't understand the difference between a hearing and a trial, unless in a hearing you have less constitutional rights than you do in a trial. I don't go for that. And in addition to the two indictments that you have got to prove, you have got a third crime in here of "planning and soliciting commission of the offense of capital murder." Now I have said in this motion that you have given us a totally inadequate time to prepare for three criminal trials, and I am saying that you have to give the same proof that the district attorney of Travis County would have to give if he had three trials. And I have to defend and Don has to defend on three trials all mixed up into one. And you are asking us to come in and defend against three criminal trials in one hearing, and you are giving us, some of you say, 10 days; I say you are giving us three days, and with all of these interruptions, you are giving me about 24 hours to prepare a defense, and Ronnie Earle is going to come over here and get the record that we make Friday, Saturday, and all next week, or however long we have to stay here, and he is going to use it against Don Yarbrough in his criminal trial. And you are just not fooling with anything but fire because you don't let me adequately defend, but yet you are going to take whatever comes out of here and take it to the courthouse and prosecute him on the criminal trials that are over there now. And so I say for Christ's sake, in the sense of fairness, give me time to prepare — let's postpone something here. Surely a man's rights are equally as important as the convenience of the legislature, and the desire of the legislature to go home. And then please abate these proceedings until we can have the constitutional rights that we deserve, which are the criminal rules of procedure, which are proof beyond a reasonable doubt, which gives me right to voir dire the jury which you have denied me, and let me take him to the courthouse and decide his rights there without you all trying to decide it in a less than a trial, which you call a hearing, and where you won't even give me the rights that Ronnie Earle is going to have to give me. And that is all I am asking.

(Inaudible remark from floor)

CARR: That's it, that's it. Exactly.

ADAMS: Mr. Chairman, I think you have properly and adequately stated it — that it is a plea in abatement to prevent them to have to try the same issues

twice. And Mr. Chairman, I would respectfully say to the chair and to Mr. Carr that we have alleged against Mr. Donald B. Yarbrough that he should be removed from office because of either incompetency, oppression in office, or other reasonable cause. And that we have alleged in here is the ultimate — is not the ultimate issue, but the ultimate issue before this committee, before the committee of the two houses sitting as a whole, as to whether or not Mr. Yarbrough is guilty of one of the things that is stated in Section 8 of Article 15 of the Texas Constitution. And that is what I just read to the chair, and I would like to proceed to have a hearing on this motion.

FARABEE: Mr. Adams, in response to Mr. Carr's position of a separate — of this being a separate criminal proceedings; do you have any response to that?

ADAMS: Well, Mr. Chairman, this is in no way under the constitution a criminal proceeding. There are no criminal penalties which can attach to Mr. Donald B. Yarbrough if we pass this resolution. There are no impositions of sentence to him to the penitentiary of this state. That will be left to the Travis County jury and the district attorney of Travis County. We can only remove him from office. It is in no way a criminal trial. We have imposed, in the interest of going to the extreme in fairness, Mr. Chairman, we have imposed upon ourselves the burden of beyond reasonable doubt. And I would certainly hope this chair, nor the legislature — either body of the legislature — or any court Mr. Carr might try to take these proceedings to on appeal, if there is an appeal, would find that this is in any way a criminal proceeding. This is a civil proceeding before the legislature under a constitutional provision, and nothing else and nothing more.

CARR: May I be heard on that?

FARABEE: Yes, you may close on it since this is your motion, and, in fact, we have presented it here, you may close on your motion.

ADAMS: Well, I have a little bit more to present if we're presenting the motion, Mr. Chairman.

FARABEE: Well, you may do so, but he will have the right to close on the motion because, in effect, it will be taken up, then.

ADAMS: Are we hearing the motion and there's going to be a ruling on the motion?

FARABEE: There is going to be a ruling on the motion of abatement which... It will either be granted or to overrule it or to rule that in effect amounts to the same thing as postponement and therefore, it should be the ruling of the House. Those are the three possibilities.

CARR: Well, then, sir, do I understand that you have already ruled that you are going to take it up tonight instead of letting the members decide it?

FARABEE: No, I am going to determine that after hearing fully from each side as to this matter, but my initial reaction was that this was in the nature of a postponement. Of course, you had a motion on a postponement and that is clearly a decision to be made by the members of the House by vote.

ADAMS: Which we do not...have any quarrel with, Mr. Chairman.

FARABEE: The abatement. Initially, it was my reaction that that was a postponement, but we have had some presentation and I asked a question about the purpose of the abatement and so I think we will go ahead and hear this matter and I will make one of the three rulings.

ADAMS: Thank you, Mr. Chairman. Without being unduly repetitious, I would say to the chair again, that this is a legislative proceeding. It is not a criminal proceeding. The ultimate issues are those issues that I read to you out of Paragraph 8 of Section 15 of the Texas Constitution. And I would say to the chair at this point that to abate this suit — we are talking about depriving people of constitutional rights up here — I would say to abate this suit, Mr. Chairman, would be to deprive the people of this state their constitutional right, through their legislature, to remove a person who possibly and could very well be proven to be unfit by his actions to decide the rights and privileges of the people of this state. Then if this motion is granted, Mr. Chairman, it would be to a time uncertain which is something that is wholly...is completely without any understanding or without any precedent in a legislative body. Everything is postponed to a time certain. The criminal case that Mr. Carr is talking about and Mr. Yarbrough's criminal problems and his problems with the Grand Jury of Travis County and the juries of Travis County have not been set for trial. The arraignment, I understand, is set for sometime in the future, but I don't feel that it would be in any way interfering with this proceeding. This session, if this motion is granted, Mr. Chairman, could very well expire and again the constitutional rights of the people of this state would be abrogated and the man who is accused herein of unconscionable actions would continue to have the right to sit and decide the privileges and the rights of the citizens of this state, and I think this motion should be denied. I think it should be ruled on by the Chair at this time, and I think it should be denied. And I think that if there is any postponement of this proceeding, it should be done properly under the properly plead motion for continuance that Mr. Carr has decided. With that, Mr. Chairman, I would close.

FARABEE: Mr. Carr.

CARR: Mr. Chairman, I would say as a word of explanation to the chairman that the arraignment just for whatever it amounts to is scheduled for July 21, and I say that the schedule you fellows have for this hearing is certainly not going to compete with the 21st. You are going to be gone a long time before then if you keep your present schedule. But we are not complaining unless you are competing with the July 21st date. According to the schedule I have seen, the legislature has set for trying this thing...

But now, I want to say to you that my honorable opponent, counsel for the proponents, is patently wrong. He says that this is not a criminal trial, a criminal hearing. Well, why did he charge then that Mr. Yarbrough has committed the offense of aggravated perjury? Why did he charge that he has committed the offense of forgery? He has got to prove it. Now, I don't find anywhere in the resolution that the legislature passed that he is accused of some obnoxious conduct. Now, those words aren't in there.

ADAMS: Mr. Chairman, I would differ with Mr. Carr. What has been alleged is certainly obnoxious conduct, and certainly falls within the ultimate issue of that section of the constitution, and it is obnoxious.

CARR: Well, any lawyer, I think, would know that if you are going to plead obnoxious conduct, you have to plead it. You don't leave it to guess.

ADAMS: Mr. Chairman, we pled obnoxious conduct.

CARR: Now the constitution, Mr. Chairman, says, and I want to read it, it says that you can have this procedure that you are looking for for the "willful neglect of duty." Now there is no allegation in there about that. "Incompetency." The word incompetency is not in here anywhere. "Habitual drunkenness." I don't think anybody has accused Judge Yarbrough of taking a drink, much less being an habitual drunkard. "Oppression in office." There is no charge that he has had any oppression in office. Or "other reasonable cause which shall not be sufficient ground for impeachment." Now I guess that is where you are coming under there. But what you have done — I don't know whether you got yourself in a box or nor — but you have pleaded commission of a criminal offense, and I am not going to let you, if I have anything to say or if I can get any judge that will hear me, I am not going to let you get away with anything less. You have got to prove the commission of a felony — three of them — because you have alleged it. Now that to me is a criminal trial.

FARABEE: That, of course, will matters of substance that will be determined in connection with evidence and is already determined in connection with the rules and the constitution. My immediate concern is distinguishing between your motion for postponement which will be for action by the respective houses and your motion for abatement. If I understand your position correctly, the reason that you filed a separate motion for abatement was in connection with legal reasons, not so much because you needed more time because you stated that for postponement, though the effect might be the same, but because of these other legal proceedings, criminal, civil or otherwise.

CARR: Well, no, that is not exactly right, Mr. Chairman, in all due regard to you. You are part right...90 percent right...but I am saying if you are going to make me try, if you are going to take Judge Yarbrough out of the courthouse, and bring him over here into a joint session, and we are going to try his indictments here, which is exactly what you are doing, then I need more time to prepare for three criminal trials, and you are not giving it to me, so I am asking for postponement because of it.

FARABEE: All right. Did you have any other statements to make in connection with your motion for abatement?

CARR: That's all.

FARABEE: If not, the chair will rule on the motion for abatement. The chair will not rule on the motion for postponement. That will be deferred to a vote of the Committee of the Whole of the House, the Committee of the Whole of the Senate. But on the basis of what you've stated the purposes of your separate motion for abatement to be, the chair will overrule the motion for abatement and defer the matter of postponement to the House and the Senate.

The next matter we will go to is the motion to dismiss, and I will recognize Mr. Carr in connection with that motion.

CARR: Mr. Chairman, the legislature, in its wisdom, made the judgment that it would proceed against Judge Yarbrough based upon a procedure authorized by Section 15 — excuse me — Article 15, Section 8, of the Texas Constitution. The basis of this motion to dismiss is two-fold. First, Article 15, Section 7, of the Texas Constitution provides, "The legislature shall provide by law for the trial and

removal from office of all officers of this state, the modes for which have not been provided in this constitution." Now it is our position that this provision provides for the right of certain accused officers to a trial prior to removal from office. Now the prosecutors tonight have admitted that we are not getting a trial, we are getting a hearing. And apparently to the prosecutors, this is a very fundamental difference. So I must accept that. By denying Judge Yarbrough the right to a trial before his removal from his office, this legislature denies Judge Yarbrough his rights of due process and equal protection as guaranteed by the constitution and statutes of the United States and of the State of Texas.

Now, Article 15, Section 8, of the Texas Constitution provides that "The Judges of the Supreme Court...shall be removed by the Governor on the address of two-thirds of each House of the Legislature for willful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient grounds for impeachment;..." And then it proceeds to set out the hearing that we are supposed to have. The causes set forth in the resolution which this hearing is based upon come under the category, "other reasonable causes". But they fail to meet the requirement of not being sufficient grounds for impeachment. Now let me state to you that in our constitution there are two procedures by which a judge of the supreme court can be removed. One is the one the legislature adopted here. That is the procedure of address which states in complete terms the basis upon — the grounds, rather — for an address. And none other. Because it says that you may bring proceedings for removal of a Supreme Court judge for "reasonable causes which shall not be sufficient ground for impeachment". Otherwise, you have to bring an impeachment proceeding against him. It's clear as water.

Now, I say to you that impeachment will not lie for the causes named in Section 8 and address will not lie for the causes named in Sections 1 to 5 which is impeachment. They are not at your choice. You have to go under the right proceedings because the proceedings are different. Impeachment is a criminal process. It has different rules of evidence. It has different burdens of proof. And the constitution says that you have got to make your choice but you have got to get the right one. Now what you have done, you wanted to go under address, but you are impeaching him because of the grounds upon which you stated, which are not included in address. Now this is not a technical thing, this is a basic constitutional provision. And I am going to argue that here and try to show you.

The grounds for impeachment are not enumerated, but the courts have established that we must look into the common law, into the methods that were used in the English Parliament, and the parliamentary bodies in America, and I propose to do that — not in great detail because we have got to get a hearing here in 24 hours — but we have got to do a little bit of this. All right. Section 1 of Article 2 of the constitution of Texas provides that the powers of government shall be divided into three distinct departments, and that each of these departments shall be confided to a separate body of dignity: legislative and judicial and executive. All of us know that. But also it provides that no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the other except in the instances herein expressly permitted. Now Section 8 is one of those. Section 8, however, is not a carte blanche grant of power to the legislature, and to the executive departments to remove a member of the judicial department. It is a grant of power — we just read that — but it is a limitation upon the power of these two departments to remove a member of the judicial department, and the limitation being that the power to remove by address exists only for the causes named. Namely, other reasonable causes which shall not be sufficient for the ground of impeachment.

Now, what are the causes? Well, before I get into that, let me stay on this point just a minute. I want to be sure that I convince you, if it is possible to convince you. The correctness of this proposition is so apparent I would think that the citation of authority not necessary. But if any of you are inclined to doubt, then I invite you to consider the authorities that I am going cite you, just here briefly. I am not going to cite all of them in any way.

The opinion in Ferguson vs. Wilcox, (28 SW2d 533), and the authorities there cited, support the contention that since the constitution provides that judges who have willfully neglected their official duties shall be removed by the governor upon address of the legislature; impeachment cannot be resorted to as a means of removing the judge for the cause named.

In the course of the opinion, the court said, "It is a rule for the construction of constitutions constantly applied that where a power is expressly given and the means by which or the manner in which it is to be exercised is prescribed, such means or manner is exclusive of all other."

Ex parte-Massey (92 SW 1086), the Court of Criminal Appeals through presiding Judge Davidson laid down the rule in these words, "It is a well-known rule, sanctified by all legal authorities, that where the constitution provides how a thing may or shall be done, such specification is a prohibition against its being done in any other manner." This is but the application of the familiar rule that the expression of one thing is the exclusion of another and, therefore, is decisive of legislative authority.

Again, in Holly vs. State, the same court held, "When the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases."

In the case of State vs. Moore, Judge Staton laid down the rule in these words, "It must be presumed that the constitution in selecting the depositories of a given power, unless it be otherwise expressed, intended that the depository should exercise an exclusive power with which the legislature could not interfere by appointing some other officer to the exercise of the power." And he further said that, "The constitution might empower the legislature to withdraw power from the hands in which the constitution placed it and to confer the same upon another officer or tribunal cannot be questioned, but to enable the legislature to do so, the power must be given in express terms." Now what the constitution says is that if you are going to try to remove a member of the supreme court for other reasonable causes, it has to be for other reasonable causes that shall not be grounds for impeachment, otherwise, the constitution says there is no recourse but to remove him by impeachment. And you have chosen the wrong way, and you are acting in an unconstitutional manner.

Now what is the causes for impeachment? I have already told you and reminded you that the causes for impeaachment are not set out in the Texas Constitution. But the Texas Supreme Court has held that causes for impeachment are, and I quote, "such official delinquencies, wrongs, or malfeasances are justified impeachment according to the principles established by the common law, and the practice of English Parliament, and the parliamentary bodies in America." That was the quote out of Ferguson vs. Maddox, supreme court case.

The causes for impeachment contained in the United States Constitution, and the constitutions of many sister states, and used by parliament for hundreds of years, include high crimes and misdemeanors. And that's it. When you have high crimes and misdemeanors, the constitution says that you shall remove him by impeachment. And if you have to remove him by impeachment, you cannot, unless you violate the constitution, try to remove him by address.

"Since the fourteenth century, the phrase 'high crimes and misdemeanors' had been used in English impeachment cases to charge officials with a wide range of criminal and noncriminal offenses against the institution and fundamental principles of English government." That is not my quote. That is a quote out of P. V. Rodina, High Crimes and Misdemeanors, written in 1973.

The Texas House of Representatives Select Committee on Impeachment concluded in 1975...in the United States it was never intended that impeachment grounds be restricted to that conduct which was criminal in nature. The causes charged against Mr. Yarbrough in the resolutions which you have adopted are within the meaning of the phrase, "high crimes and misdemeanors." You have charged him with forgery, you have charged him with perjury, and you have charged him with planning to commit murder — high crimes and misdemeanors — and those crimes are not subject to removal by address. You are violating the very constitution that you proclaim you are trying to uphold.

Now, I'm not denying that you could bring your proceedings by impeachment, but do it the way the constitution says. The legislature is wrong. You've gone the wrong way, and you are doing a wrong, an unconstitutional act. I'm not the first man who said this. Dan Moody, Jr. stood up here today and he made a fine presentation. I didn't like it, but I admired him for what he said. He did a good job. He's a good lawyer. His famous father in 1931 or 1932, stood up before the Senate of the State of Texas, where there was involved the impeachment trial of Honorable J. B. Price, who was at that time the judge of the 21st Judicial District, and I want to quote a little bit here. Now, his position was exactly reverse to ours tonight, because he was arguing that because they had accused his client of certain misconducts that that did not amount to impeachment, it amounted to address. And so in bringing an impeachment proceedings, (and he argued this successfully) that the legislature, in 1931, made a mistake and they were violating the constitution themselves.

Now he says here "certain causes for removal are named", he's talking about the address proceedings, and then it is added that "a judge may be removed for other reasonable causes which shall not be sufficient grounds for impeachment."

The framers of the constitution undoubtedly drew a distinction between these causes for removal by address and high crimes and misdemeanors for which an officer might be impeached. It was in all probability in their minds that in this section of the constitution, that people were being given a means of keeping the judiciary above question by providing a method of removal for the slightest breach of official duty. Address.

And it was doubtless in their minds that designing people might attempt to make of that which was intended for good a means of oppression of innocent and honorable judges. As a protection from such oppression, they provided in the constitution that a judge should not be removed except upon the vote of two-thirds of each house.

Impeachment was provided to protect the people from officers who were guilty of high crimes and misdemeanors. The framers of the constitution made no provision as to the number of votes of the people's representatives, that is the House of Representatives, that would be required to impeach, but it gave to the officer charged with high crime and misdemeanors the protection afforded by the requirement of a two-thirds vote to convict an impeached officer.

No more conclusive argument can be made, Governor Dan Moody said, in support of the general proposition than was made by Major W. M. Walton in the trial of [W. L.] McGaughey before the Senate of Texas sitting as a court of impeachment. This argument, he said, was made by one of the most courtly gentlemen possessed of one of the finest legal minds that ever appeared before the tribunals of this state.

The following is quoted from Major Walton's argument. He said, "I call your attention to the Eighth Article, to the address remedy, and the officers who are mentioned in that article, in part, are the same officers that are mentioned in the Second Article under the head of impeachment.

"Now, look at this language," he said, "look at this language. I am asking you to read your constitution, like you would read anything else. There is no technical word here. There are no words which we have to go to a dictionary to learn the meaning of, or to a glossary to find out their use. You have to go to no law book nor anything of the sort, but read it like you would read a letter from a friend.

"Now let's see what it says," and I'm still quoting, "The judges of the supreme court, the court of appeals, the district court shall be removed by the governor on the address of two-thirds of each house of the legislature for willfull neglect of duty, incompetency, habitual drunkenness, oppression in office or other reasonable cause which shall be not sufficient grounds for impeachment". What does that mean. I'm still quoting. "Is there a member of the court here, who can for a moment hesitate to express what he understands by that? These judges are subject to impeachment under the Second Article under the head of impeachment. The same officers then under the Eighth Article are subject to be addressed out of office for what? The neglect of duty? Incompetency, habitual drunkeness, oppression in office or other reasonable causes not sufficient for impeachment.

Suppose that we had one of our district judges here on the impeachment trial, and you had alleged against him incompetency, habitual drunkenness, oppression in office, neglect of duty or any other thing along that plan that does not amount to a prohibitive crime or offense under the statute laws of the State of Texas. And his counsel had interposed a general demurer or a general denial on the grounds that no impeachable matter had been alleged in the Article. Would you impeach him anyhow? Would you impeach him anyhow?

Notwithstanding that Article Eight says that neglect of duty, incompetence, habitual drunkenness, oppression in office are not sufficient cause on which to found articles of impeachment. If language can be understood in intermixture of words and phrases meaning nothing and incomprehensible to any intelligence, then that is what the article means: that you cannot impeach a judge of the supreme or district court for the offenses, misdemeanors, improprieties and wrongdoings which are mentioned in the Article.

Now, this is what the constitution says. You didn't write the constitution. Then, what is the inference? The necessary inference from the use of these words, and the argument flows as naturally to its conclusion as water runs downhill, that for impeachment there must be a graver offense than neglect of duty, oppression in office, habitual drunkenness, or incompetency.

The argument is here, there is no mode or manner of logic to get away from. It is, therefore, for the reason stated, and upon the authority cited, respectfully submitted, that address is the proper and only procedure upon which a district judge can be removed for the causes alleged in the articles of impeachment. Again, I'm quoting Dan Moody. His position was reversed here, and he asked that the proceedings would be dismissed. His words were heard, in 1931, and they are just as good today. The legislature has reversed the situation today but you are just as unconstitutional in what you are trying to do to Judge Yarbrough today, as they were back yonder with a judge named J. D. Price. You've got to obey the constitution.

Now your honor, or judge, or chairman, it is upon this basis that we say that the causes charged against Donald B. Yarbrough, in such a resolution, are within the meaning of high crimes and misdemeanors, and, therefore, address can not be legally and constitutionally used to remove Judge Yarbrough because these are not

reasons that you have in your resolution for address. They are reasons for impeachment. Start your proceeding over, impeach him if you want to, but do it right. You've got your horses mixed up. And we ask as a result of that, that you are not proceeding correctly and that this motion to be dismissed be granted. And frankly, gentlemen, even though it might be embarrassing to someone, embarrassment or convenience is still mighty minor when it comes to obeying the constitution and trying to do a serious thing like you're trying to do. If you are going to remove him, at least remove him so that it will stick and that it will not be a shadow or a discredit to the work that all of you honorable, honest men of integrity are trying to get done.

FARABEE: Motion to dismiss is denied. It's getting late, I guess you are right but I would be —

MALONEY: Mr. Chairman, Mr. Carr's argument put me in mind of the man who was charged with attempted murder in his defense is that he didn't attempt to do it, he did it. Because I think under our constitution people are concerned about the judges of this state. We have three methods of removal in the constitution: removal by the judicial qualifications, (I am talking about the supreme court judges) removal by judicial qualifications commission, removal by address, removal by impeachment. But I would remind you that impeachment includes other officers other than supreme court judges.

Address, if I may use the term, addresses itself to judges in particular. Mr. Carr wishes to take the position that they are mutually exclusive. I do not believe the constitution intends that at all. The constitution...otherwise you would have no way of removing the governor of the State of Texas, if his crime were less than, Mr. Carr says, a felony, which we all know is not the case.

Address is a cummulative remedy. It is the remedy that is...of the two remedies provided to the legislature, impeachment and address, the legislature may make its choice. If you follow Mr. Carr's reasoning, it would be that address is only for what we will call, quote, "minor" offenses. And yet it's illogical when we look at it and see that the burden is actually a heavier burden. It requires a two-third vote of each house of the legislature, whereas impeachment only requires only a majority of the vote of the House of Representatives and a two-thirds vote of the Senate. So it would be illogical to say that, "Well, for the most minor offenses, we're going to have a two-thirds vote, but for the heaviest offenses we are only going to have the House of Representatives voting it by majority." It simply does not make sense. But, because of the fact that we are dealing with two different remedies: one which applies to most all of our high government offices in this state, another which is peculiar to judges, my belief is that the constitution means or intends that there will be other remedies. In fact, the will of the people even said that the legislature doesn't act often enough. We'll provide another way, the Judicial Qualifications Commission, that does not require the action of the legislature.

So it is our position that address is a cumulative remedy. It is not limited to what Mr. Carr says, "only those offenses which are not impeachable" but simply remarks that it may be used in offenses which are not impeachable, but not excluded from those offenses which are impeachable. It is simply an alternate method of removal of a judge with, as I will remind you, a lighter, we will call it, punishment penalty prescription. It does not allow for the permanent barring from holding public office.

And this is, I think, a substantial difference. It is the difference that I think that...where you would make your choice as to what you are going to do with the judge you are going to remove. Whether you are going to bar him from public office, you would use impeachment; if you simply wish to remove him from office,

the constitution provides the mode of address. They are cumulative remedies, not exclusive remedies. Thank you, Mr. Chairman.

CARR: Mr. Chairman, I do not propose to say other than that I have tried to quote, cite cases, go back into the Parliament of England, the tried cases of the states of the United States, and including several of Texas. I've cited them to you. You can read them yourself. And to me, that is a little better than just trying to analyze it here on this particular time and on this particular occasion, saying that all these court decisions are wrong. I submit it to your careful consideration and I would be pleased to further give you a brief on this if you want to seriously consider it.

FARABEE: Do you have any further authorities with you at this time, other than what you...

CARR: Yes, sir. I had about 25 of them. I thought you wouldn't want to go into it. I can make them available to you.

FARABEE: Do you have those in the form of a brief or what?

CARR: I must thank Dan Moody for them and give him credit for them. He had an article on it. I will be glad to let you see it. I would want to make you a copy of it because I intend to use it...

FARABEE: Do you have them with you?

CARR: Yes, sir. That is, I have part of them with me.

(Pause)

FARABEE: The chair, having considered the motion for dismissal and the arguments of counsel for the proponents and for the respondent, overrules the motion for dismissal. And we will proceed now to the next motion and the next series of motions dealing with procedural matters, and then we will finish with matters dealing with evidence.

The first motion on procedure deals with the motion to apply the rules of criminal procedure in the criminal courts of Texas. Mr. Carr, will you be arguing that...

CARR: Yes. Mr. Chairman, it is our position that you have, in your resolution, charged the commission of crime; felonies. Now, you are going to have to prove the commission of three felonies — or two of them, I don't know what that third one is — but two of them you are going to have to prove crimes. I think it is rather basic in our laws and in our constitution that you do not prove crimes by the use of civil procedures. I don't see that there is even any argument about that. And when each house goes back to vote on this resolution, your resolution says that each house has to vote by a two-thirds vote, beyond a reasonable doubt. That is what you put in your resolution. So somebody around here — and that is the legislature — knows that this is a criminal proceeding because it is saying that we have to...you have to prove your resolution beyond a reasonable doubt. But you've got a camel here. You've got a horse with a head on both ends. You are saying that, "O.K., we are going to use the criminal rule — burden of proof, and we have to prove it against Judge Yarbrough beyond a reasonable doubt," and that's the criminal law. But then you say, just before that, that you are going to prove these

crimes by the use of civil procedural law. Now, I can't tell where you are headed. You've got to get on or you've got to get off. And what we are saying here is that you can't get around the fact that you are proving a criminal offense, if you can — which I deny — but that is the burden of proof you've got. Now, if you are going to prove a violation of a...the criminal law of Texas, it is rather basic to me, you simply have to prove it by the rules of criminal procedure, just like they do in the courthouse over here in Travis County, or anywhere else. As long as you are having a hearing on criminal matters, you go according to criminal rules: presumption of innocence, burden of proof, the standard of proof, and so forth, as we state here. And I have never heard of anybody — I don't care whether you call it a trial or a hearing — where you are allowed without violating the constitution and laws of the State of Texas to prove a crime by civil rules. So, we are asking that the rules of criminal procedure in the criminal courts of Texas be followed in the hearing in which you have here in which you are to establish that Judge Yarbrough committed offenses against the criminal laws of the State of Texas. And that is all, it is as simple as that.

FARABEE: Mr. Nabers.

NABERS: Mr. Chairman, let me be the first to say that I would have to agree with Mr. Carr if we were in a criminal proceeding. And of course, you have heard that argument and you have heard that persuasion offered here tonight, and I think you consistently have ruled properly in your rulings. This is not a criminal procedure. It is not a criminal proceeding. We cannot punish Justice Yarbrough, as much as we would like to, maybe, by sending him to jail or prison or fining him. We can't even disbar him. The only thing we can do is ask the governor and address the governor to remove him from office. Consequently, if you accept the argument that it should be criminal, then I would be the first to agree that we should have criminal rules, but it is not. It is a legislative matter set up by the constitution. Unfortunately, our constitution did not provide procedures for this matter. The legislature has imposed upon itself additional burdens — one of those burdens being the reasonable doubt that each house must vote on. We imposed that on ourselves. We didn't have to impose that. I think it is an object of every member that is serving on this group of men here tonight to offer counsel to the proponents of this resolution to provide and see that a fair hearing is given to Justice Yarbrough greater than our Texas constitution requires and even meeting the constitutional muster of the United States Constitution.

Now, then, I have asked, and I think Mr. Carr would agree with me — he will have an opportunity to disagree with me — but he and I sat down and talked about the rules of procedure. We offered him an opportunity to suggest rules in House Concurrent Resolution [No.] 2. We even gave him our work papers — what we were considering — and he did not come back; he did not offer anything further. He did not ask any of these things that he now comes and asks for you. The Legislature, in its legislative procedures has adopted the resolution of HCR 2 in which to proceed under. These rules are rules that guarantee and protect Justice Yarbrough's rights far greater than the constitution ever envisioned when it was written, or even today under the United States Constitution and the decisions arising therefrom.

So I would submit to you, Mr. Chairman, that the rules that we have adopted cannot be amended at this late date; that Mr. Carr — Justice Yarbrough, through his attorney — has had the opportunity to make suggested changes in these rules. Suggested changes were offered on the floor. The House and the Senate have adopted this resolution, and consequently, I would submit to you that these are the rules that would meet the constitutional muster as required by our constitution, and

even goes further to give the rights to the defendant or to the person who is subject to the removal address, Justice Yarbrough. Thank you.

FARABEE: Mr. Carr.

CARR: Very shortly, Mr. Chairman, I would say that I wish I had understood at the time that I conferred with Mr. Nabers that I had the right to suggest that this be tried by criminal rules. I would have been happy, very happy, at that time to suggest that to him. I think it would have been an effort in futility, but I do want to say that I don't want to be held to having waived this because I had no understanding that he was offering to let me write your resolution. Had I known that, I would have been very happy to accommodate him and rewritten it entirely. But, perhaps, I am not too late today, and before the trial, in suggesting to you that maybe we both made an error and perhaps we should change it tonight — at least to give us the right to be governed by the laws of criminal procedure if we are going to go into trial of a criminal hearing, which this is.

FARABEE: Mr. Carr, you are aware that the rules provide that on final adjournment of the joint meeting, each House shall retire to its chamber and shall consider and determine whether beyond a reasonable doubt that the legislature should address the governor to remove Donald B. Yarbrough from the office of Associate Justice of the Supreme Court?

CARR: Yes, sir. I referred to that in my original arguments to the point that I do understand that, and obviously that is where I had the two-headed argument awhile ago. You got us there by civil rules and then you say at the last since this is a criminal case, we are going to suddenly adopt the criminal rules. We are saying all the way through.

FARABEE: Are there any criminal penalties in connection with the address proceedings brought here that are in the criminal code?

CARR: No, I cannot say that, that there is. I am just saying, Mr. Chairman, that what you are doing is trying to prove Ronnie Earle's case, and then we get over there — he's sure got 'em. It is a mere technicality as far as Judge Yarbrough is concerned that you are not going to put him in jail and Ronnie Earle is.

FARABEE: What you are saying then, is that although these — this is not a criminal proceeding — that some of the matters alleged may or may not amount to a crime?

CARR: I am not saying "may or may not." I am saying that you have alleged the commission of a crime, period! You have got to prove that a crime was committed, and you can't do it by following the civil rules of procedure and still protect my client's constitutional rights.

FARABEE: If you prove that, have you proved incompetence?

CARR: He is not charged with incompetency. Read it.

ADAMS: Mr. Chairman, this puts us on the horns of dilemma. Had we alleged incompetence in our petition, Mr. Chairman, we would then be subjected to special exceptions asking us to plead specifically. Had we alleged other reasons, we

would then have subjected to special exceptions, and quite properly so, to plead those other reasons. We have just avoided and tried to have been fair to Mr. Carr and his client in alleging specific reasons that make Judge Yarbrough fall within Article XV, Section 8.

FARABEE: The motion for application of the rules of criminal procedure is overruled.

Next, we will move to the motion to place witnesses under the rule prior to hearing on merits of the resolution. Mr. Carr.

MALONEY: Mr. Chairman, for the sake of time, we have absolutely no objection...to abide by the rules has been our intention all along.

FARABEE: Specifically, Rule 15 provides separation of witnesses, and as I understand your motion, Mr. Carr, you are invoking the rule or requesting that the rule be applied as it is provided for in Rule 15. Is that correct?

CARR: Mr. Chairman, I did that simply as a vehicle to do it now instead of at the hearing.

FARABEE: That motion is granted.

Next, we will move to the motion to prohibit all proponents and their agents of the resolution to address the Governor of Texas to remove said Donald B. Yarbrough from office from voting on said resolution.

CARR: This, Mr. Chairman, is so basic that I feel sort of silly up here trying to push it on you. I cannot imagine the prosecutors here trying to remove Judge Yarbrough and then when it comes time to vote, they jump upon the jury and vote for the jury — with the jury. To me, there is something so basically dishonest about that. Why, if I was in a courthouse and the district attorney, after prosecuting and indicting and everything else — and that is what you fellows have done, you passed a resolution here making all these charges — and then they prosecute and do everything they can to remove Judge Yarbrough, and then when it comes time to vote they vote to remove him. These gentlemen cannot be fair-minded voters. They are not part of a jury, they are prosecutors. And I simply cannot imagine any fair-minded body such as this saying that the accusers can vote to convict. And I am saying to you that we want a clear understanding that they cannot vote as a member of the jury because these men do not have a fair mind. They cannot prosecute and judge at the same time, and that includes the prosecutors, the proponents, the authors who file this resolution with the obvious intent of removing Judge Yarbrough, and then they sit down and you tell me they can vote fair about this and turn down their own resolution. The very fact that they have developed the resolution means that they want him out of office. The Lieutenant Governor, the Speaker of the House, Chairman of the Joint Committee of the Whole. I can't imagine being surrounded by enemies, so to speak, and then they sit on the jury and vote against me and that is what they are going to do. I am asking for fair-play and that is all. You've got 150 members of the House; all you need is a hundred. You've got 50 to spare. Give me a chance. Don't load them. And that's all I meant. It is that simple.

FARABEE: Mr. Hance.

HANCE: Mr. Chairman and Mr. Carr. First off, I would like to point out that we are not prosecutors. We signed a resolution. We are authors of a

resolution. Article 15, Section 8, says that in all such cases, a vote shall be taken There are no exceptions in this. Thus, it was contemplated that all the members vote and indeed that they are mandated to vote. The proponents or authors of the resolution are not excluded, and to do so, I would submit to you if you disenfranchise any of the six of us from voting, the three in the Senate, you have taken away from the citizens of this State — in my district 385,000 — in Senator Adams, also in Senator Jones, 385,000 people in three different areas that they would be without their vote in the legislature on a very important matter, and with the House members, it would be approximately 75,000. For a presiding office, you Mr. Chairman, you have no authority, no legal authority under the constitution to disqualify the Lieutenant Governor or any member of the legislature from voting. Now the one time that any of the legislature would be disqualified from voting would be, and then under the constitution, if they have a personal or private interest in a matter. And the member of the legislature, the legislator himself or herself, would be the sole judge. I think it is quite apparent, we are not prosecutors, we are carrying a resolution, and if you extended Mr. Carr's argument, you would, in effect be saying that on resolutions and bills as they come before the legislature, you wouldn't have a right to vote on your own resolution or your own bill. Thank you.

FARABEE: Mr. Carr to close.

CARR: Well, Mr. Chairman, if you want to let yourself vote and the Speaker of the House vote, and the Lieutenant Governor vote, give me something. Keep the prosecutors from voting or let me examine them some way to determine whether they are going to be fair. You are denying me, and I know you are going to do it, if you don't mind my saying so (My batting average ain't been too good today.) you are denying me the right to question him, but you are guaranteeing him the right to vote. But you won't let me reach him to find out if he has his mind already made up. I can't even touch him, he's a Senator. He's a member of the House. What's so good and terrible about that. He is judging the future of a judge and if he can't submit himself to examination as to his fairness, he ought not to vote. Now don't stand out there in no man's land and say, "Don't touch me," I am a Senator or Representative. I am telling you I am trying to fight for the right of man over here that is a Supreme Court Justice. You are reaching out and touching him good, but you won't let me even ask these men a question as to whether they can be fair, and yet, you think that I believe that, that they are going to be fair; in the light of the argument on the floor the other day that many of you had already made up your mind. How are you going to convince people of his district that he thinks he needs to vote for, how are you going to convince those people that whatever you do, you are being fair when you put a gold fence around your face, I can't ask you a question because you are a Senator or a Representative. When you are sitting on the jury, shame on you.

FARABEE: The chairman observes that it is really not within the scope of authority to deny members of the legislature, the Senate or the House, the right to vote, and we further observe that divinity of address is not one of a jury trial nor the members of the legislature, members of a jury; that it is a constitutional proceeding and the people who run for and are elected and hold office are subject to those procedures in the constitution whether they be impeachment, address, or otherwise. Further, we would cite to the parties here the case of Winthrop vs. Larkin, 95 Supreme Court 1456, 421US35, involving administrative procedures by a medical board ruling license of physicians where the United States Supreme Court ruled that the parties on the board, who in fact were at the same time — in that instance — presenting evidence for removal of license, did have authority to vote, so there is

authority, but apart from that, this chair does not have the authority to deny votes or the right to vote to the members of the legislature in this constitutional proceedings, and therefore, the motion is overruled.

CARR: Mr. Chairman, we reserve the right to request arguments for the presentation of this to the committee as a whole at the proper time. If the chairman doesn't have the authority, then I would like to get someone that does have authority.

FARABEE: Of course, it was adopted in the rules. The rules have been made available, if not they will be. We will move now to the motion requesting a voir dire examination of all persons who essentially will vote on the resolution to address. Mr. Carr.

CARR: Well, we have pretty well argued this one out. I'd say that — of course the purpose of this voir dire examination that we are asking is to determine how many of the members of the House and the Senate are disqualified because they potentially will vote on the resolutions, and we want to know whether we are getting a fair hearing. We have got to have something that we can do outside of nothing. I notice that several representatives argued last Monday that many of their colleagues have already decided whether Yarbrough should remain in office without having heard the evidence - quote, "I've talked to several members and they've all expressed opinions," said Representative Paul Moreno of El Paso...and others — you were there. If you are going to give Mr. Yarbrough a fair trial, you can't load it. If you can't talk about being fair, and you can't talk about constitutional rights, when you gang up on him with a bunch of minds that are already made up. And I ask, respectfully, the right to at least find out whether the minds that are judging Judge Yarbrough are fair-minded people, and I can't imagine being denied that right when you are trying to prove criminal offenses on a high judge of this state of ours.

FARABEE: Mr. Jones.

JONES: May it please the chair. It's quite clear, Mr. Chairman, that the purpose of this motion by the respondent is to challenge and possibly disqualify members of the legislature from participating in this proceeding. And in our opposition we contend, first of all, that Article 15, Section 8 of the Texas Constitution imposes a duty — an obligation — upon the members of the House and the members of the Senate to hear and decide this matter of address. Secondly, the legislative article of the Texas Constitution provides the only instance where a member of the legislature may not vote on a measure pending before the legislature: that is the instance where the member has, in essence, what is a conflict of interest, and in that instance the member himself, or herself as the case may be, is the only person who can make that decision to disqualify themself. And thirdly, Mr. Chairman, I would say to you that **H.C.R. 2** does not, in any way, provide for voir dire examination in any respect.

Additionally, Mr. Chairman, I would say to you and submit in all due respect to the chair, that the presiding officer — the presiding officers, that is — and the legislature itself, or the chair, is without the authority to disqualify a member of this legislature from participating in this proceeding. As a result, the voir dire examination, since there is no ability to disqualify, would be time-consuming, and it would be meaningless. Now, General Carr can refer to this proceeding as a trial and he can equate the members of the legislature to a jury, but that doesn't make this proceeding a trial and it doesn't make the members of the legislature a jury simply by calling them that. And I would submit to you, Mr. Chairman, any more than calling the bloom of an East Texas bitterweed a rose, makes a rose.

And, for those reasons, Mr. Chairman, I respectfully move that this motion be overruled.

CARR: Nothing except this, Mr. Chairman. Some way, when you take on a serious task like the legislature is taking on with fortunes and future and reputation and public office are at stake, I'm not very much impressed with the fact that something shouldn't be done because it's time-consuming. Now that's his argument. He says it's time-consuming to try to give us a fair trial; so we are not going to take the regular precautions; that we have a right to because it's time-consuming. He says it's meaningless. He said, further, that what I'm trying to do is disqualify members from voting. The only ones that I'm trying to disqualify from voting, Mr. Chairman, are those that have already made up their minds. What's so terrible about that? Why should they be allowed to vote? I'll make a proposition with you. Tomorrow, you take a poll of the members of the House and Senate. And if two-thirds of them have already made up their minds, let's not have the hearing. You are wasting my time. Now that's how serious it is. If two-thirds of you have already decided, let's go home: - vote. And I'll persuade Judge Yarbrough that fighting is useless and we'll go some place else.

Well, in the first place, these rules that you all hold in such reverence were made by you. Now you talk about rules — don't allow that — who made the rules — God? You all made them. I don't have any doubt, Mr. Chairman, that if you all decided as a body that anybody that is prejudiced and got his mind made up, he ought not to vote, just push that button up there "present, not voting" or go home. I think they'd go. I don't think you would have to make them do anything. I think that people are fair if you say to them, "If you have made up your mind and you can't be a good juror" — you all keep using that — technicalizing on me — you are jurors; you are voting; you are making a decision after hearing; and if you said to the members of this House, "If you don't believe you can be a fair judge of this, why don't you just not vote?" or "Why don't you go on home?" or whatever. I have confidence in that, but this business of saying that you can't touch me, and you can't even inquire, and you are not even going to ask them to be fair, and you are not going to put them under oath to be fair — nothing — you are not going to do anything. You are just going to let those people that Paul Moreno said have already made up their minds — they are going to vote, and they are going to vote against Judge Yarbrough. Let them go down here to the lake and get on a boat, because there is nothing I can say Friday that is going to change them. They've already made up their minds. Let's get them on a boat and let them go picnic while the rest of us decide the future of Judge Yarbrough.

FARABEE: Would you acknowledge that the members of the...(inaudible)

CARR: Certainly. Most of them never read it.

FARABEE: The chair will lay out the prehearing motion and take up about John William (Bill) Rothkopf...Mr. Carr.

CARR: Mr. Chairman, I don't think we have to identify Mr. Rothkopf. Mr. Rothkopf is the central figure in your hearing, and Ronnie Earle's trials, and in the disbarment suit. If it weren't for Rothkopf and his charges, we wouldn't be here tonight. You wouldn't have anything that you could try Judge Yarbrough on. Now Mr. Rothkopf comes up here and he appeared before the grand jury with a sack over his head. He was guarded all the time he was here. Nobody can get next to him. The authorities of the State of Texas guard him, and then he puts that sack back on his head and he goes out, gets in an official car, and they abscond him out and put

him in hiding. And he's in hiding today. And I've done everything that I can to get him. I can't find him and I don't know whether you all can or not, but we need Mr. Rothkopf. Mr. Rothkopf is a material witness to any of these trials and you're in the process of forcing us to trial without our major accuser being present, even though we've used every facility we have to get him. He is our major accuser. We have a constitutional right to confront our accuser. We have the constitutional right to cross-examine him and we have subpoenaed him and unless he is here Friday, we cannot go to trial or, excuse me, hearing. And so we're asking that we be at least allowed to take the deposition of Mr. Rothkopf before you force us to the hearing. It's not that we don't want to or that we haven't tried. We simply cannot find him. He's a ghost but yet we have to meet in your hearing because everything that's going to be there is Mr. Rothkopf. Mr. Rothkopf. Where is Mr. Rothkopf? But you're not giving us even the right to confront Mr. Rothkopf or cross-examine Mr. Rothkopf before you're putting us to trial or hearing or whatever you fellows want to call it. Now, I'm saying to you that Mr. Rothkopf is material and essential to our defense and we cannot prepare our defense until we get Mr. Rothkopf. And all privilege due and everything that you need on your hurrying up or get this thing over and we can go home. We need Mr. Rothkopf and I'm asking you just as a right that I have, if not anything else, just a sense of fairness, let me find Mr. Rothkopf or you help me find Mr. Rothkopf. Put the Rangers out. Let's go get him but let me take his deposition and let him be present so I can cross-examine him because you're using him on your side, but you're not giving me this equal opportunity to even cross-examine him for my client. And I'm asking that you even it up and that's all we're doing and that's the reason we're asking it.

FARABEE: Mr. Grant.

GRANT: Mr. Chairman, I shall be brief. There are two reasons why this motion should not be granted. First of all under the rules governing this hearing, adopted by the House, Rule 13, set forth what the production of witness and other evidence and there's provisions for subpoenaing any witnesses that either proponents or respondents want in this hearing. There is no provision anywhere in Rule 13 or any other portion of these rules for depositions. Now I will point out that the only other rule, Rule 16, involves evidence but this speaks to the admissibility of evidence under the Rules of Civil Procedure or the Civil Rules of the Courts of this state and does not authorize the taking of depositions. So, certainly under the rules, there is no right to depose Mr. Rothkopf.

Now, secondly, and we speak specifically to the motion to depose Mr. Rothkopf, and I would say that he is not the accuser. The allegations were set forth in this proceeding in H.C.R. No. 1. Now there are some erroneous statements in this motion concerning Mr. Rothkopf. First of all, it states that he is the proponent's primary witness. That is not true and I will state at this time we do not intend to call Mr. Rothkopf and, therefore, he's not our witness. On the other hand, Mr. Rothkopf has been subpoenaed for the respondent in this case. And I have verified with the sergeant-at-arms' office that he was served today with process so he is afforded his opportunity as provided under the rules and I see no necessity for deposing him.

CARR: What was that announcement that he's been what? Served?

MALONEY: Yes, sir.

CARR: I have never heard of that. Is he going to be here?

MALONEY: He was served today a subpoena as your witness.

CARR: I'm glad you told me. Nobody had told me. Is he going to be here?

MALONEY: I don't know.

CARR: Well, I think we need to find out. I don't want it be represented here that he's going to be here unless he isn't — unless he is. Now they say that Mr. Rothkopf is not going to be their witness. That's ludicrous. Everything you've got, everything you have from Rothkopf is the proof that you're going to offer against Judge Yarbrough in support of this resolution. There's not one thing in here that you're not going to use that didn't come from Rothkopf. Oh, man, talk about Rothkopf is not going to be your witness. What you mean is you've taken everything that he has as dates and all of his charges and all of his testimony that he gave out yonder when none of us were there, and you're going to use it and then you have the technicality of an argument saying that Rothkopf is not going to be your witness. Ridiculous! Rothkopf is your witness and I have a right to cross-examine him. I'd like to know, for example, he made the contact. We have a question of entrapment in this case. Are you going to deny me that? We have the question of plea bargaining. We have the question of credibility of the man who stands behind some place over yonder and he can't be found by me or anybody else that I know of. I'm very surprised and I appreciate the state telling me that my subpoena tonight has been delivered. But he's not going to be here. You know where he is. You know that he's not going to be here. His credibility is at issue. He has additional meetings and conversations with other people that are material. The intent of the parties involved and these tapes is important. Don't tell me they're not material. Mr. Rothkopf has to be found and I have to face him and he has to face me in representing Judge Yarbrough. You can't deny that to me. In sense of fairness, in constitutional rights and statutory rights or whatever, you can't have everything your way and then claim that you're giving Judge Yarbrough, who has nothing, a fair trial and that's exactly what you're doing. I don't care whether you go behind the technicality that you're not using Mr. Rothkopf. Maybe it's because you don't want to use Mr. Rothkopf. You've got all the fruits of his labor. Maybe it's a strategy on your part not to use Mr. Rothkopf. But I want Mr. Rothkopf. He's important to my defense, and you are denying me the right to the most important witness in all of this hearing and I say we should have it, Mr. Chairman.

FARABEE: The rules make no provisions for depositions. I understand that Mr. Rothkopf will not be called to testify. If he is here to testify, then you'll have opportunity to cross-examine him and the motion is overruled.

The final motion for consideration this evening is prehearing motions for production and discovery of items and objects in the possession of the proponents and their agents. The resolution still addresses the Governor of Texas to remove Judge Donald B. Yarbrough from office. Mr. Carr, you have set out a fact here in a matter of seven items.

MALONEY: Mr. Chairman, with the — have the — coming up with Mr. Carr and not wasting any time, I am prepared to tender many of these things that Mr. Carr has asked for and I think probably be more appropriate for me to tender them and then if he has any further arguments, of course, we'll make that argument.

FARABEE: All right, would you go through them?

MALONEY: Yes, sir. I will go through them.

FARABEE: I have visited here and advised the matter...and then we'll have :he argument and hearing on the remaining items.

MALONEY: Mr. Chairman, Item 1 states any and all alleged statements, :onfessions, admissions, copies, transcripts, or recordings of the same made by Judge Donald B. Yarbrough, whether written or otherwise recorded, including but not limited to grand jury testimony on June 28, 1977, an alleged conversation with John William (Bill) Rothkopf. At this time the record of...we'll tender to Mr. Carr the conversation of Donald B. Yarbrough. These are not originals. I do not have originals for you in my possession. These are copies taken from the original recordings. I do not have and have not had the original recordings.

You have asked for grand jury testimony on Donald B. Yarbrough given on June 28, 1977, testified at Travis County Grand Jury.

I only have transcriptions of tape recordings — the conversations between Donald B. Yarbrough and John Rothkopf on May 13, 1977, and on May 16, 1977. May 16th in Austin, Texas, and May 13th does not indicate what day it is. We do not have any further transcripts of those. We are in the process of having them made, and we will make them available to you as soon as they are available, but we want you to have what we do have. That is all that I have under Item 1.

Item 2 refers to all articles of a tangible nature owned or previously owned, or previously possessed by the said Donald B. Yarbrough. I do not have any such items in my possession and have not had.

Item 3 — Any and all alleged statements, confessions, admissions, and copies of transcripts and recordings of same made by any persons who have participated with the said Donald B. Yarbrough in any of the alleged transactions upon which this — are based, including but not limited to conversations with John William (Bill) Rothkopf. I present at this time a transacription of the statement of John W. Rothkopf of May 2, 1977; a further transcription of the statement by John W. Rothkopf on May 4, 1977.

The results, worksheets and reports of a physical examination — this is Item 4, Mr. Chairman — scientific tests, experiments made in connecion — I have none. I have requested none. I have not accepted.

Number 5 — A list of the names and addresses of all prospective witnesses who acknowledge the fact that of said causes and who in reasonable likelihood will be used at the hearing as witnesses. I tender at this time such a list to counsel.

Number 6 — Any and all recorded statements made concerning said causes made by any persons who are prospective witnesses. I have none other than those that have already been provided.

Number 7 — Any evidence or information in the possession or subject to control or known to the proponents or their agents which is inconsistent with the alleged guilt of the said Donald B. Yarbrough. I have none and know of none.

That is all that I have, Mr. Chairman.

FARABEE: Do you have copies for the court reporter, or if not could we have them marked for identification those matters which you have in front of you?

MALONEY: Certainly, I have no objection, and think that it would be a very good idea.

FARAEE: Could you do that now?

(Documents referred to were presented and marked Exhibits 1 through 7.)

ADAMS: At this point in time, Mr. Chairman, we would like to respectfully request that Mr. Carr tender to us a list of the witnesses he intends to call.

FARABEE: Do you have a list of the witnesses that you could tender to them, that you anticipate calling?

CARR: I do not have a list.

FARABEE: Could you furnish a list?

CARR: Yes.

FARABEE: When could you reasonbly furnish it?

CARR: Well, I'll sorta do like they do; as soon as we can.

FARABEE: Well, there are several ways of handling it. They can file a formal motion, but we are in a proceeding to determine these things.

ADAMS: Mr. Chairman, I would be glad to dictate a motion to the court at this time if Mr. Carr likes.

CARR: That is not necessary. I'm not going to argue about that. But, you asked me when — by tomorrow — by noon tomorrow.

FARABEE: Furnish a list of the witnesses that you reasonably anticipate. Now that is with the understanding that some of your work will be in the nature of rebuttal, and that you can't anticipate everything that may be presented.

CARR: I'll do my best. I would like to return the compliment. Mr. Chairman, will they give me the originals of the tapes and the other statement transcripts by tomorrow noon? You know we are within 24 hours of the hearing. It's not going to do me much good to get them tomorrow night.

FARABEE: The representation made is that they don't have the originals in their possession. For cause shown, and if they have the originals I would be glad to set up something — some manner of supervision whereby comparisons could be made if you have any questions as to whether these, in fact, are copies of the originals. Is that your contention?

CARR: My contention is that...

MALONEY: I would like to make it clear at this time that we do not have the originals; we have never had the originals; these are copies that were provided to use. It is all we have. We do not have anything in our possession more than what we have given Mr. Carr.

CARR: Well, I don't dispute that, but I assume that he is going to have the originals to introduce into evidence. I assume, that I'm not unreasonable in saying, Mr. Chairman, that I have to have time to compare the copies that he has so graciously given me here 24 hours before I'm to be on trial, with the originals. And

they are 3 and 1/2 hours, I've read. You all want to go to a hearing in 24 hours and we've got the federal court tomorrow, and I guess I'll stay up all night and hear these in order to meet your schedule — and your convenience — your schedule. But what I'm getting at is there is just not enough days — days — there's not enough hours to do and prepare the defense under your schedule.

MALONEY: It is our intention that the moment that we get the originals, that we can hear the originals to notify Mr. Carr immediately. He will hear them the first time just like we do the first time.

FARABEE: Mr. Carr.

CARR: Well, I don't doubt the good faith of anybody in this room. I'm just saying that there's some people in this room that have the authority to relieve this situation we're in, this rush to judgment, by giving us a time to adequately prepare and you're not doing it. I don't think there's anybody in this room that's fair-minded that thinks that if they were in my situation, Mr. Chairman, that they could possible prepare where we get the evidence partially presented to us 24 hours before we start with all that we have to do. And I am pleading with you, not just for delay, but give us a chance to prepare our defense before you force us to go to trial. And it's impossible to do it and I realize that you —

FARABEE: You will have an opportunity to present that motion.

CARR: Yes, sir. I realize you're going to let me present that but I'm saying here's some people in this room that could help on it right now without waiting until Friday morning.

FARABEE: Anything else on the motion to produce?

CARR: Well, sir, I think he's covered every one of them. I don't have anything else to say. It's just lacking.

FARABEE: Do you have anything else on the proposal?

MALONEY: No sir, we have tendered everything that Mr. Carr has called for.

FARABEE: Motion —

CARR: Your honor. Excuse me.

FARABEE: Go ahead.

CARR: The list, Mr. Chairman, that was presented to us is listed as Prospective Witnesses for the State. There's some 27 names on there and I believe under the resolution that has been passed, it says "The Speaker shall notify the opposing party or his counsel of the name of the witnesses subpoenaed and an itemized list of any papers or other items subpoenaed." When do we get that?

MALONEY: Mr. Chairman, if I may be heard on that?

FARABEE: Yes, sir.

MALONEY: His motion was directed to anyone that we might call as a witness. I will tell the chairman at this time I do not intend to call all of these witnesses and have not issued a subpoena for these witnesses, but should it develop that I will call these witnesses, I would not want to be barred by the chair from calling these witnesses because I didn't tell Mr. Carr that they were reasonably expected, that they might be called. He did not ask for only the witnesses we have subpoenaed. He said for anyone whom we might reasonably expect to call.

CARR: That's correct. I have no argument there. All I'm saying is that Rule 13, Subsection B says, your rules, not my motion, states that as soon as practicable after issuance of process, the Speaker shall notify us of the witnesses subpoenaed. If you haven't subpoenaed any, I can understand —

MALONEY: We can't understand what you are referring.

CARR: All right, I'm just asking you when do I get the list, you see?

MALONEY: I will check your list right now.

CARR: All right. That will be fine.

FARABEE: Senator Adams.

ADAMS: (inaudible)

FARABEE: That's correct. Are there any other matters?...

CARR: The counsel for the proponents filed immediately prior to commencement of this meeting, the motion to...limiting and at that time...

FARABEE: The chair will reserve the right to rule on that until either next proceeding of this nature or immediately prior to commencement of the proceedings on Friday morning.

****

The Pretrial Conference then adjourned at 11:25 P.M.

APPEARANCES

Senator Ray Farabee, Chairman of the Committee as the Whole Senate

Representative L. DeWitt Hale, Chairman of the Committee as the Whole House

COUNSEL FOR THE PROPONENT

Representative Bob Maloney, Chief Counsel
Senator Don Adams
Senator Gene Jones
Senator Kent Hance
Representative Lynn Nabers
Representative Ben Grant

EXHIBITS INTRODUCED IN EVIDENCE

Exhibit #1	Tape recordings (7)
Exhibit #2	Travis Grand Jury Proceedings transcription dated 6/28/77
Exhibit #3	Transcription of conversation between Donald B. Yarbrough and John William Rothkopf dated 5/16/77
Exhibit #4	Transcription of conversation between Donald B. Yarbrough and William Rothkopf dated (unknown)
Exhibit #5	Transcription of conversation, Donald B. Yarbrough and John William Rothkopf May 13, 1977 and May 2
Exhibit #6	Conversation held on May 4, 1977
Exhibit #7	Name and address of all prospective witnesses.

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

ORIGINAL RESPONSE OF DONALD B. YARBROUGH TO THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On this the 12th day of July, 1977, without waiver of any right or privilege of the Respondent/Accused Defendant, Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, and subject to the rulings of this Honorable Legislature on the pre-hearing motions of the said Donald B. Yarbrough, the said Donald B. Yarbrough tenders to this Honorable Legislature, this, his Original Response to H.C.R. No. 1 filed July 5, 1977 and S.C.R. No. 1, filed July 11, 1977, and says the following:

RESPONSE TO CAUSE 1.

For response to the first cause, Respondent/Accused Defendant pleads not guilty and denies each and every, all and singular, the material allegations contained in the said first cause and respectfully requests this Legislature to require the proponents of the first cause to prove their charges beyond a reasonable doubt as is required by the Constitutions, Statutes and Laws of the United States and the State of Texas. And he denies that any and all substantive matters in the said first cause contained, in manner and form as the same are therein stated, and set forth, do, by law, constitute a cause for address, within the true intent and meaning of the Texas Constitution.

RESPONSE TO CAUSE 2.

And for response to the second cause, Respondent/Accused Defendant pleads not guilty and denies each and every, all and singular, the material allegations contained in the said second cause and respectfully requests this Legislature to require the proponents of the second cause to prove their charges beyond a reasonable doubt as is required by the Constitutions, Statutes and Laws of the United States and the State of Texas. And he denies that any and all substantive matters in the said second cause contained, in manner and form as the same are therein stated, and set forth, do, by law, constitute a cause for address, within the true intent and meaning of the Texas Constitution.

RESPONSE TO CAUSE 3.

And for respondent to the third cause, Respondent/Accused Defendant pleads not guilty and denies each and every, all and singular, the material allegations contained in the said third cause and respectfully requests this Legislature to require the proponents of the third cause to prove their charges beyond a reasonable doubt as is required by the Constitutions, Statutes and Laws of the United States and the State of Texas. And he denies that any and all substantive matters in the said third cause contained, in manner and form as the same are therein stated, and set forth, do, by law, constitute a cause for address, within the true intent and meaning of the Texas Constitution.

And he, in submitting to this Honorable Legislature, this his response to H.C.R. No. 1 filed July 5, 1977, and S.C.R. No. 1 filed July 11, 1977, against him, respectfully reserves leave to amend and add to same from time to time, as may become necessary or proper, and when and as such necessity and propriety shall appear.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that H.C.R. No. 1 and S.C.R. No. 1 shall be denied and of no force and effect.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEYS FOR RESPONDENT
ACCUSED DEFENDANT
DONALD B. YABROUGH

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH TO POSTPONE THE HEARING ON THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On this the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, without waiver of any right, or privilege of the said Donald B. Yarbrough, respectfully represents to the Honorable Legislature that due and proper preparation of and for the hearing will require, in the opinion and judgment of such counsel, that a period of not less than thirty (30) days should be allowed to the Associate Justice of the Supreme Court of Texas and his counsel for such preparation and before the said hearing should proceed.

As a basis for this motion, Donald B. Yarbrough states that he has had no opportunity to prepare his defense, that this hearing has been set for only three (3) days after the resolutions have been passed and he has had a totally insufficient amount of time to prepare his defense, and/or prepare his cross-examination of his accusers, that the authorities have hidden and continue to hide the main accuser of Judge Yarbrough, that all attempts to take the deposition of the accuser have been resisted, and that extensive adverse publicity concerning said causes prejudices said Donald B. Yarbrough's defense and prevents him from receiving a fair hearing. That the apparent "rush to Judgment" without giving Judge Yarbrough adequate time to prepare his defense is a reflection upon the fairness and integrity of the Legislature and an absolute denial and deprivation of Judge Yarbrough's Constitutional rights which this Legislature should respect and protect, not violate.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH FOI PRODUCTION AND DISCOVERY OF ITEMS AND OBJECTS IN POSSESSION OF THE PROPONENTS AND THEIR AGENTS OI THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLI HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On this 12th day of July, 1977, the counsel for Donald B. Yarbrough Associate Justice of the Supreme Court of Texas without waiver of any right o privilege of the said Donald B. Yarbrough, and under the provisions of th Constitution and Statutes of the United States, and further under the Constitutio and Statutes of the State of Texas, requests this Honorable Legislature in advanc of any hearing on the merits of these causes to permit such counsel to inspect, copy photograph or subject to scientific analysis the following tangible objects in th possession and control of the proponents of the resolutions and their agents, to-wit

1. Any and all alleged statements, confessions or admissions and copies transcripts or recordings of same made by the said Donald B. Yarbrougl whether written or otherwise recorded, including but not limited to gran jury testimony on June 28, 1977, and alleged conversations with Joh William "Bill" Rothkopf.
2. All articles of a tangible nature owned or previously possessed by the sai Donald B. Yarbrough.
3. Any and all alleged statements, confessions or admissions and copies transcripts or recordings of same made by any person who participate with the said Donald B. Yarbrough in any of the alleged transaction upon which said causes are based, including but not limited t conversations with John William "Bill" Rothkopf.
4. The results, worksheets and reports of physical examination, scientifi tests and experiments made in connection with said causes.
5. A list of the names and addresses of all prospective witneses who hav knowledge of the facts of said causes, and who in reasonable likelihoo will be used at the hearing as witnesses.
6. Any and all recorded statements made concerning said causes by an persons who are prospective witnesses.
7. Any evidence or information in the possession or subject to the control o known to the proponents or their agents which is inconsistent with th alleged guilt of the said Donald B. Yarbrough.

As a basis for this motion, Donald B. Yarbrough states that the objects an matters requested are material and necessary for the preparation of his defense an that the items sought were obtained through channels which make them no otherwise procurable by the said Donald B. Yarbrough through the exercise of du diligence. This motion is made in good faith and not for the purposes of delay. The

requested items are in the possession of the proponents or their agents and cannot be examined prior to hearing other than by order of the Legislature and the said Donald B. Yarbrough has no other way to determine the contents, quality or existence of the above-stated items and objects than through this motion for production and discovery of evidence and cannot otherwise prepare for hearing without such discovery, thus, delaying the hearing.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
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Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH TO TAKE THE DEPOSITION OF JOHN WILLIAM "BILL" ROTHKOPF PRIOR TO HEARING ON THE MERITS OF THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On this 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, without waiver of any right or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitutions and Statutes of the United States and the State of Texas, demands the right to take the deposition of John William "Bill" Rothkopf prior to the hearing on the merits of these causes, for the following reasons:

1. That the witness, John William "Bill" Rothkopf is a material witness in these causes and he has been, and is being, hidden and secreted by the authorities which has resulted in the inability of counsel for the said Donald B. Yarbrough to find him, serve him with legal process, or to propound questions to the said John William "Bill" Rothkopf.
2. That there is now no other legal proceeding by which Respondent/Accused Defendant may compel the discovery of the witness' testimony.
3. That neither the Respondent/Accused Defendant, nor his defense counsel are aware of what testimony the witness, John William "Bill" Rothkopf, will give except to recognize that he is the proponents' primary witness in their attempts to prove the charges in this cause.
1. That the witness, John William "Bill" Rothkopf is a material witness in these causes and he has been, and is being, hidden and secreted by the authorities which has resulted in the inability of counsel for the said Donald B. Yarbrough to find him, serve him with legal process, or the propound questions to the said John William "Bill" Rothkopf.
2. That there is now no other legal proceeding by which Respondent/Accused Defendant may compel the discovery of the witness' testimony.
3. That neither the Respondent/Accused Defendant, nor his defense counsel are aware of what testimony the witness, John William "Bill" Rothkopf, will give except to recognize that he is the proponents' primary witness in their attempts to prove the charges in this cause.
4. That counsel for the Respondent/Accused Defendant are unable to adequately prepare the defense in these causes because of being prohibited from obtaining John William "Bill" Rothkopf's testimony, and thus this motion should be granted to assure all rights due to the Respondent/Accused Defendant.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(OVERRULED
RAY FARABEE
7-13-77)

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH FOR VOIR DIRE EXAMINATION OF ALL PERSONS WHO POTENTIALLY WILL VOTE ON THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas without waiver of any right or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitution and Statutes of the United States, and further under the Constitution and Statutes of the State of Texas, requests to have a voir dire examination of all persons who potentially will vote on the resolutions to address the Governor of Texas to remove the said Donald B. Yarbrough from office and thereby make findings of guilt or lack of same of the said Donald B. Yarbrough of committing the acts alleged in the causes stated in the said resolution. The purpose of the said voir dire examination is to challenge any particular person disqualified by law who potentially will vote on said resolutions and causes contained therein. Such challenge is to be based upon the cause of such particular person's prejudice against the said Donald B. Yarbrough, or other legal causes of disqualification, thus preventing an unfair hearing in which those voting upon the resolutions are biased or prejudiced against Judge Yarbrough or otherwise legally disqualified.

WHEREFORE, PREMISES CONSIDERED, Respondent/ Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(OVERRULED
RAY FARABEE
7-13-77)

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH TO PROHIBIT ALL PROPONENTS AND THEIR AGENTS OF THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE FROM VOTING ON SAID RESOLUTIONS.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas without waiver of any right or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitution and Statutes of the United States, and further under the Constitution and Statutes of the State of Texas, requests to have this Honorable Legislature prohibit all prosecutors, proponents, authors, and their agents, and the Lt. Governor, the Speaker of the House, the Chairman of the joint committee of the whole, of the resolutions to address the Governor of Texas to remove the said Donald B. Yarbrough from office from voting on said resolutions.

As a basis for this pre-hearing motion, the said Donald B. Yarbrough would show unto this Honorable Legislature that to allow said prosecutors, proponents, authors, and their agents, and the Lt. Governor, the Speaker of the House, and the Chairman of the joint committee of the whole, to charge the said Donald B. Yarbrough of acts constituting violations of the criminal laws of Texas and then to vote as to the guilt or lack thereof of the said Donald B. Yarbrough of committing such acts, denies the said Donald B. Yarbrough of his guaranteed rights of due process and equal protection under the Constitutions and statutes of the United States and the State of Texas. To allow such would be tantamount to letting a district attorney, after prosecuting, sit and vote as a member of the jury.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(OVERRULED
RAY FARABEE
7-13-77)

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH TO PLACE WITNESSES UNDER THE RULE PRIOR TO HEARING ON THE MERITS OF THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On this 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, without waiver of any right or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitution and Statutes of the United States, and further under the Constitution and Statutes of the State of Texas, and pursuant to H.C.R. No. 2, 65th Legislature, First Called Session, requests to have witnesses on both sides, except the Respondent/Accused Defendant, the said Donald B. Yarbrough, sworn and removed out of the chambers where said hearing is to be held, to some place where they cannot hear the testimony as delivered by any other witness in the causes and that they be instructed to not talk about their testimony with any person other than the attorneys for the State and/or Judge Yarbrough.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Elventh Street
Austin, Texas 78701

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(GRANTED AS PER
RULE 15
RAY FARABEE
7-13-77)

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH FOR APPLYING THE RULES OF CRIMINAL PROCEDURE IN THE CRIMINAL COURTS OF TEXAS TO THE PROCEEDINGS OF THE RESOLUTION TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On this the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, without waiver of any right, or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitution and statutes of the United States, and further under the Constitution and Statutes of the State of Texas, in advance of any hearing on the merits of these causes to prescribe rules of procedure in the matter of these causes, including the following rules, presumptions and standards, to-wit:

1. The presumption of innocence of the Respondent/Accused Defendant;
2. The burden of proof on the proponents of such resolutions;
3. The standard of proof being beyond a reasonable doubt; and
4. The provisions of the code of criminal procedure of Texas be applied.

As a basis for this motion, Donald B. Yarbrough states that the said causes in such resolutions allege violations of the criminal laws of the State of Texas and that any hearing in the State of Texas having the force and effect of law and further having the potential sanction of loss of rights based upon findings that the Defendant engaged in conduct which violated the criminal laws of the State of Texas, must provide that the defendant be afforded due process and equal protection of law by requiring compliance with the Rules of Criminal Procedure and Evidence.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(OVERRULED
7-13-77
RAY FARABEE)

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH TO ABATE ALL PROCEEDINGS CONCERNING THE RESOLUTIONS TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas without waiver of any right or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitution and Statutes of the United States, and further under the Constitution and Statutes of the State of Texas, requests this Honorable Legislature to abate all proceedings concerning the resolutions to address the Governor of Texas to remove the said Donald B. Yarbrough from office.

As a basis for this pre-hearing motion, the said Donald B. Yarbrough would show unto this Honorable Legislature the following:

1. The said Donald B. Yarbrough has been indicted by a grand jury in Travis County, Texas. The said indictments allege the same occurences as are alleged in causes 1 and 2 of H.C.R. No. 1, which is one of said resolutions for address.

2. Evidence and testimony developed at the address hearing can, and will, be used by the State at the trial of the criminal indictments and it is vital to Judge Yarbrough's constitutional rights that he be allowed to adequately prepare for the upcoming criminal trials themselves without this hurried Legislature hearing which denies him adequate time to prepare his defense against said criminal charges.

3. Said proceedings should be abated until such criminal charges are tried.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEYS FOR RESPONDENT
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(Verbatim copy of original document as received)

(FILED JULY 12, 1977
2:45 P.M.)

STATE OF TEXAS
SIXTY-FIFTH LEGISLATURE
FIRST CALLED SESSION

PRE-HEARING MOTION OF DONALD B. YARBROUGH TO DISMISS ALL PROCEEDINGS IN THE LEGISLATURE CONCERNING OR ANSWERING OUT OF THE RESOLUTION TO ADDRESS THE GOVERNOR OF TEXAS TO REMOVE THE SAID DONALD B. YARBROUGH FROM OFFICE.

TO THE HONORABLE SENATE OF TEXAS AND THE HONORABLE HOUSE OF REPRESENTATIVES, STATE OF TEXAS:

On the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas without waiver of any right or privilege of the said Donald B. Yarbrough, and under the provisions of the Constitution and Statutes of the United States, and further under the Constitution and Statutes of the State of Texas, requests this Honorable Legislature to dismiss all proceedings in the Legislature concerning or answering out of the resolution to address the Governor of Texas to remove the said Donald B. Yarbrough from office.

As a basis for this pre-hearing motion, the said Donald B. Yarbrough would show unto this Honorable Legislature the following:

1. Article XV, Section 7 of the Texas Constitution provides:

> "The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." (emphasis added)

The above quoted provision provides for the right of certain accused officers to a trial prior to removal from office. By denying the said Donald B. Yarbrough the right to a trial before his removal from office, this Honorable Legislature denies the said Donald B. Yarbrough his rights of due process and equal protection as guaranteed by the Constitutions and Statutes of the United States and the State of Texas.

2. Article XV, Section 8 of the Texas Constitution provides:

> "The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each house of the Legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address ahall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the Journals of each House respectively." (emphasis added.)

The causes set forth in the said resolutions come under the category "other reasonable cause" but fail to meet the requirement of not being "sufficient ground for impeachment."

The above quoted provision provides that the "other reasonable cause" must not be sufficient ground for impeachment.

The causes for impeachment are not set out in the Texas Constitution, but the Texas Supreme Court has held that causes for impeachment are "such official delinquences, wrongs, or malfeasances as justified impeachment according to the principles established by the common law and the practice of English Parliament and the parliamentiary bodies in America." Ferguson v. Maddox, et al, 263 S.W. 888, 892, (Texas Supreme Court, 1924).

The causes for impeachment contained in the United States Constitution, the constitutions of many sister states, and used by Parliament for hundreds of years include "High crimes and misdemeanors."

"Since the fourteenth century, the phrase 'high crimes and misdemeanors' had been used in English impeachment cases to charge officials with a wide range of criminal and non-criminal offenses against the institutions and fundamental principles of English government." P. V. Rodino, High Crimes and Misdemeanors 18 (1973).

The Texas House of Representatives Select Committee on Impeachment concluded, "... in the United States, it was never intended that impeachment grounds be restricted to that conduct which was criminal in nature." Texas Legislature House of Representatives, Select Committee on Impeachment Report to the Speaker and the House of Representatives 8 (1975).

The causes charged against the said Donald B. Yarbrough in such resolutions are within the meaning of the phrase "High crimes and misdemeanors" and are therefore not properly used as causes for said address.

WHEREFORE, PREMISES CONSIDERED, Respondent/Accused Defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/Waggoner Carr

/s/Donald F. Nobles

/s/Bob Blinderman

Suite 305, Stokes Building
314 West Eleventh Street
Austin, Texas 78701
(512) 472-5543

ATTORNEY FOR RESPONDENT/
ACCUSED DEFENDANT
DONALD B. YARBROUGH

(Verbatim copy of original document as received)

(FILED JULY 15, 1977
10:05 A.M.)

STATE OF TEXAS)(COMMITTEES OF THE WHOLE
SENATE AND HOUSE OF)(IN JOINT MEETING PURSUANT
REPRESENTATIVES)(TO H.C.R. NO. 2

PROPONENTS' MOTION TO POSTPONE PROCEEDINGS

TO THE COMMITTEES OF THE WHOLE:

Proponents move that these proceedings be postponed until 10: a.m. o'clock on July 18th, 1977.
Dated: July 15, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of
Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 JULY 13 PM 11:22
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE
OF REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING PURSUANT
TO H.C.R. NO. 2

PROPONENTS' REQUEST FOR PRESIDING OFFICER TO LIMIT TESTIMONY

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

Counsel for Proponents respectfully move the presiding officer in limine to instruct counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, not to call as a witness any member of the senate or house without first obtaining a ruling from the presiding officer that the witness has personal knowledge of facts that are relevant and material to an issue before the joint meeting or that the counsel for Respondent intends to show that the witness has such knowledge.

As reason for such motion, Proponents state that the testimony of the members of the house or senate is wholly irrelevant to any issue in this cause and dilatory except to the extent that a member has personal knowledge of facts that are at issue in the hearing before the joint meeting.

Dated: June 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Motion granted
7-13-77
Ray Farabee)

STATE OF TEXAS
SENATE AND HOUSE OF
REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING PURSUANT
TO H.C.R. NO. 2

PROPONENTS' MOTION TO QUASH SUBPOENAS

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

On July 12, 1977, the speaker of the house of representatives, on the written request of the counsel for Repondent, issued subpoenas to the lieutenant governor and each member of the senate and house of representatives. These 182 subpoenas are identical in form, each requesting the production of "all records, documents, letters, memorandums, communications, records, and tapes pertaining to Donald B. Yarbrough." Proponents respectfully request that the presiding officer quash each of these subpoenas for the following reasons:

I.

For reasons set out in Paragraph II of this motion, it is Proponents' position that legislators are not amenable to these subpoenas. Even if they were subject to them, however, Respondent's attempt to subject each of the 182 members of the committees of the whole to a subpoena is an obvious "fishing expedition." Respondent should not be permitted to have blanket subpoenas issued to all of the 182 committee members; rather, he should be required to establish with respect to each member for whom a subpoena is sought that the member has personal knowledge or possesses evidentiary matter that is relevant and material to the issues properly before these proceedings.

II.

Subjection of legislators to mandatory process in this proceeding, as requested by Respondent, is tantamount to subjecting them to the ancient practice of "civil arrest," from which they are protected under Article III, Section 14, of the Texas Constitution. As the method of enforcing a subpoena is the issuance of a writ of attachment on an allegation of contempt, a procedure that includes the arrest of the subpoenaed party, it would contravene the meaning and intent of this constitutional protection to uphold these subpoenas.

III.

The 182 persons to whom these subpoenas were issued constitute the entire membership of the committees of the whole that are meeting in these proceedings to hear argument and evidence concerning the charges against Respondent in H.C.R. No. 1 and S.C.R. No. 1. Respondent's request to issue a subpoena to each of them is a "back-door" attempt to provide for a prehearing voir dire examination of each member of the committees, a procedure not authorized in the rules governing these proceedings and one which would be inappropriate for the reasons stated in Proponents' response to Respondent's motion requesting voir dire examination.

IV.

The legislature has adopted rules for these proceedings that afford Respondent a far higher degree of procedural protection than he is entitled to under the state and federal constitutions or than he would be entitled to if he were the defendant in a judicial trial. Indeed, the rules guarantee Respondent the ultimate degree of protection consistent with the legislature's discharge of its solemn obligation under Article XV, Section 8, of the Texas Constitution, and the protection of the interest of the people of Texas in the integrity of their judiciary. Upholding the blanket issuance of these 182 subpoenas without a showing of reasonable cause that they will yield relevant and material evidence would serve only to prolong or delay these proceedings, would detract from their dignity by creating a circus atmosphere, and in no way would promote justice.

For these reasons, Proponents request that the presiding officer quash each of these subpoenas.

Dated: July 13th, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 JULY 13 PM 7:54
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE OF REPRESENTATIVES

COMMITTEES OF THE WHOLE IN JOINT MEETING PURSUANT TO H.C.R. NO. 2

PROPONENTS' ARGUMENTS AGAINST RESPONDENT'S MOTION TO SUBJECT TO VOIR DIRE EXAMINATION PERSONS WHO MAY VOTE ON THE RESOLUTION TO ADDRESS THE GOVERNOR TO REMOVE RESPONDENT

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

On July 12, 1977, Respondent moved to subject to voir dire examination all persons who might vote on the resolution to address the governor to remove the Respondent. Respondent cites as his purpose a desire to challenge any person who may be disqualified by law from voting on the resolution. Proponents urge the presiding officer to deny this motion for the following reasons:

I.

There are no legal grounds by which these persons may be disqualified from voting. The persons Respondent seeks to subject to voir dire examination are the elected representatives of the people of Texas. These elected representatives have a duty imposed on them by the constitution to hear and decide this matter. Texas Constitution, Article XV, Section 8. There are no legal causes by which the elected representatives of the people may be disqualified from voting other than that found in Article III, Section 22, of the Texas Constitution, which provides that a member of the legislature may not vote on a measure or bill in which he has a personal or private interest. It is well settled that a legislator is the sole judge of whether he is disqualified from voting on a measure because of a personal or private interest. Neither the presiding officer nor the legislature has authority to bar a member of the legislature or the lieutenant governor from voting on any measure.

II.

Rule 1, H.C.R. No. 2, governing these proceedings, limits the committees of the whole, while meeting in joint session, to taking evidence and arguments of counsel on the charges and does not provide for voir dire examination by Proponents or Respondent.

For these reasons, Proponents request that Respondent's motion for voir dire examination be in all things denied.

Dated July 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

**(Filed 1977, July 13 PM 7:54
HOUSE OF REPRESENTATIVES)**

STATE OF TEXAS
SENATE AND HOUSE
REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING
PURSUANT TO H.C.R. NO. 2

PROPONENTS' MOTION TO DENY RESPONDENT'S MOTION TO ABATE ALL PROCEEDINGS CONCERNING THE RESOLUTION TO ADDRESS THE GOVERNOR TO REMOVE DONALD B. YARBROUGH FROM OFFICE

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

The motion of Respondent requesting that the address proceedings against him be abated until after certain criminal charges against him are tried should be denied for the following reasons:

I.

The purpose of the constitutional authorization for removal of judges by address is not to punish judges for criminal acts but rather to protect the public from judges whose conduct is inconsistent with the fair and proper administration of justice. To delay the address proceedings until after the criminal charges against Respondent are finally disposed of, a process that might take months or even years, would thwart the constitutional design and weaken public confidence in the Texas judicial system.

II.

One of the causes for removal, solicitation of capital murder, is not the subject of a criminal charge against Respondent.

For these reasons, Proponent urges that Respondent's motion to abate the address proceedings be denied.

Dated: July 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 JULY 13 PM 7:54
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE OF
REPRESENTATIVES

COMMITTES OF THE WHOLE
IN JOINT MEETING PURSUANT
TO H.C.R. NO. 2

PROPONENTS' REQUEST FOR PRESIDING OFFICER TO LIMIT TESTIMONY

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

Counsel for Proponents respectfully move the presiding officer in limine to instruct counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, not to call as a witness any member of the senate or house without first obtaining a ruling from the presiding officer that the witness has personal knowledge of facts that are relevant and material to an issue before the joint meeting or that the counsel for Respondent intends to show that the witness has such knowledge.

As reason for such motion, Proponents state that the testimony of the members of the house or senate is wholly irrelevant to any issue in this cause and dilatory except to the extent that a member has personal knowledge of facts that are at issue in the hearing before the joint meeting.

Dated: July 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of
Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 July 13 7:54PM
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE OF
REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING
PURSUANT TO H.C.R. NO. 2

PROPONENTS' MOTION TO DENY RESPONDENT'S MOTION TO PROHIBIT PROPONENTS, THEIR AGENTS, THE LIEUTENANT GOVERNOR, SPEAKER, AND PRESIDING OFFICER FROM VOTING ON ADDRESS RESOLUTIONS

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

On July 12, 1977, counsel for Respondent moved that "all prosecutors, proponents, authors, and their agents, and the Lt. Governor, the Speaker of the House, [and] the Chairman of the joint committee of the whole" be barred from voting on the resolutions to address the governor for Respondent's removal from office. Proponents urge the presiding officer to deny this motion for the following reasons.

The presiding officer has no legal authority under the constitution or laws of Texas or under H.C.R. No. 2 to disqualify the lieutenant governor or any member of the legislature from voting on any question. Under parliamentary law, each member of a parliamentary body is a member of the committee of the whole. Article IV, Section 16, of the Texas Constitution, provides that when the senate meets as a committee of the whole the lieutenant governor "shall have...a right to debate and vote on all questions...." Article III, Section 22, of the Texas Constitution, provides that a member of the legislature may not vote on a measure or bill in which he "has a personal or private interest...." It is well-settled that a legislator is the sole judge of whether he is disqualified from voting on a measure because of a personal or private interest. Neither the presiding officer nor the legislature has authority to bar a member of the legislature or the lieutenant governor from voting on any measure. Even if the presiding officer had legal authority to disqualify a member of the legislature or the lieutenant governor from voting, he should refrain from doing so because that would effectively deny representation in these proceedings to the disqualified officer's constituents.

For these reasons, Proponents request that the presiding officer deny Respondent's motion in all respects.

Dated: July 13, 1977

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 JULY 13 PM 7:54
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUE OF
REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING PURSUANT
TO H.C.R. No. 2

PROPONENTS' ARGUMENTS AGAINST RESPONDENT'S MOTION FOR PRODUCTION AND DISCOVERY OF ITEMS

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

On July 12, 1977, Respondent filed a motion requesting the production and discovery of certain items alleged to be in the possession of the Proponents and their agents. Proponents respectfully request that the presiding officer deny this motion for the following reasons:

I.

Respondent's request is not in compliance with the rules applicable to this proceeding. The manner in which a party may procure production of a tangible item in an ordinary civil or criminal proceeding is not applicable to this proceeding because Rule 13, House Concurrent Resolution No. 2, prescribes the rule applicable to this proceeding on that matter. That rule states, "Counsel for the proponents or the respondent are entitled to have process issued to require...the production of papers and other items that are relevant and material to an issue before the joint meeting." This statement in Rule 13 provides a complete treatment of that issue.

Under Rule 13, H.C.R. No. 2, production of a tangible item may be obtained only by process compelling production of the item. Respondent does not request process to obtain the items but instead asks to be permitted access to the items in advance of the hearing as in pretrial discovery in civil and criminal proceedings.

Rule 13, H.C.R. No. 2 provides for the production of papers and other items only if they are "relevant and material to an issue before the joint meeting." Rule 13 in effect requires a showing that an item is "relevant and material" before the Proponents or the Respondent is entitled to its production by process. Respondent makes no such showing in his motion. Respondent's motion contains a bald recital that "the objects and matters requested are material and necessary for the preparation of his defense." This statement does not indicate the manner in which the requested items are relevant to a material issue in any of the causes to be considered at the hearing.

These matters make the motion defective for failure to comply with Rule 13, H.C.R. No. 2, which contains the statement of the manner in which production of tangible items in this proceeding shall be sought.

II.

Even if the rules of civil or criminal procedure apply, those rules provide that discovery of tangible items does not extend to the work product of preparation of a case. The items listed in Respondent's motion that constitute the work product of the Proponent's presentation at the hearing should be excluded from any items that counsel for the Respondent is permitted to discover.

For these reasons, Proponents request that the presiding officer deny Respondent's motion.

Dated: July 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 JULY 13 PM 7:54
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE OF REPRESENTATIVES

COMMITTEES OF THE WHOLE IN JOINT MEETING PURSUANT TO H.C.R. No. 2

PROPONENTS' MOTION TO DENY RESPONDENT'S MOTION TO APPLY THE RULES OF CRIMINAL PROCEDURE TO THE ADDRESS PROCEEDING

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

On July 12, 1977, counsel for the Respondent moved to apply the rules of criminal procedure applicable in the criminal courts of Texas to this proceeding. The proponents urge that this motion be denied for the following reasons:

I.

The rules of procedure governing this proceeding have already been adopted in H.C.R. No. 2 and the presiding officer does not have authority to order changes in them.

II.

The address proceeding is not a criminal proceeding. The purpose of the proceeding is to insure the high quality and integrity of the supreme court of this

state and is not to criminally convict or punish a supreme court justice. Therefore, it is neither necessary nor appropriate to apply the rules of criminal procedure to the address proceeding.

III.

It is necessary only that the procedures for the address proceeding be fair. The adopted rules clearly exhibit a sense of fairness, and in some respects the rules go beyond what fairness requires. For example, the rules provide that the standard of proof in the proceeding be "beyond a reasonable doubt." This standard gives to Respondent more protection than the standard of proof applied in civil cases.

For these reasons, Proponents urge that Respondent's motion to apply the rules of criminal procedure to the address proceeding be denied.

Dated: July 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

Filed
1977 JULY 13 PM 7:54
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE
REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING
PURSUANT TO H.C.R. NO. 2

PROPONENTS' MOTION TO DENY RESPONDENT'S MOTION TO DISMISS THE ADDRESS PROCEEDINGS

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

The motion to dismiss all address proceedings against Respondent should be denied for the following reasons:

I.

Respondent contends that Article XV, Section 7, of the Texas Constitution, grants Respondent a right to a trial prior to removal from office. Article XV, Section 7, requires the legislature to "provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." (Emphasis added).

The present proceeding is provided explicitly in the Texas Constitution in Article XV, Section 8, and Section 7 of Article XV, by its express terms, is not applicable when a method of removal is provided for in the constitution. Matter of Carrillo, 542 S.W.2d 105, 110 (Tex. 1976); In re Brown, 512 S.W.2d 317, 320 (Tex. 1974).

II.

Respondent contends that the causes set forth in House Concurrent Resolution No. 1 are impeachable offenses and further contends that Article XV, Section 8, of the Texas Constitution, prohibits removal by address for causes that are impeachable offenses.

The constitution authorizes removal of members of the judiciary by address to provide a swift, but fair, mechanism for removing a judge whose conduct reflects adversely on the judiciary. Impeachment is a more time-consuming procedure applicable to "grave official wrongs," Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924), and carries a more serious sanction—disqualification from holding office in the future. The two removal procedures are not exclusive, however. The legislature may pursue the speedier but lesser remedy—removal by address—even though the causes might justify impeachment and disqualification from future office, simply because it is speedier. It would be anomalous to conclude that the legislature may not invoke the speediest procedure for the most serious offenses.

In fact, the express language of the constitution compels the conclusion that impeachable offenses may be the cause for removal by address. Article XV does not define impeachable offenses, but Section 8 of that article expressly includes oppression in office as a ground for removal by address. Oppression in office is clearly sufficient grounds for impeachment.

Prior practice in Texas also supports the conclusion that impeachable offenses may be cause for removal by address. During the First Session of the 14th Legislature of the State of Texas in 1874, several judges were removed by address under the 1869 constitutional provisions on impeachment and address, which were identical to the provisions of the current constitution. The principal charges against the judges involved abuse of office, including bribery in one case. Joint Committee of the House and Senate, 14th Legislature of the State of Texas, First Session, 1874, Hearings on Charges Against Six District Judges. In fact, the issue in question arose during that session. After Judge Chambers had been acquitted of Articles of Impeachment, a senator filed a resolution to remove him by address. The committee to which the resolution was referred, chaired by Senator Ireland, concluded that grounds of impeachment may be made the basis of address, stating that "if [the legislature] sees proper to pursue the milder course of address in which no disabilities follow conviction, as in impeachment,...it might do so." Senate Journal, 14th Legislature, 1st Session, 1874, at page 613.

For these reasons, Respondent's motion to dismiss the address proceedings should be denied.

Dated: July 13, 1977

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

(Filed
1977 JULY 13 PM 7:54
HOUSE OF REPRESENTATIVES)

STATE OF TEXAS
SENATE AND HOUSE OF
REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING PURSUANT
TO H.C.R. NO. 2

PROPONENTS' MOTION TO DENY RESPONDENT'S MOTION TO TAKE DEPOSITION OF JOHN WILLIAM "BILL" ROTHKOPF

TO THE PRESIDING OFFICER OF THE COMMITTEE OF THE WHOLE:

On July 12, 1977, Respondent moved to take the deposition of John William "Bill" Rothkopf. Proponents urge that this motion be denied for the following reasons:

I.

Proponents do not intend to call John William "Bill" Rothkopf as a witness in the proceedings concerning H.C.R. No. 1 or S.C.R. No. 1. For this reason, this person is not a material witness as alleged by Respondent and there is no cause for him to be deposed by Respondent.

II.

The rules of procedure governing these proceedings that were adopted in H.C.R. No. 2 do not provide for such a deposition. These rules only adopt the rules of evidence applicable in civil courts on the question of admissibility.

For these reasons, Proponents request that the presiding officer deny Respondent's motion in all respects.

Dated: July 13, 1977.

COUNSEL FOR PROPONENTS:

/s/Robert Maloney, Chief Counsel

On the part of the House of Representatives—

Ben Z. Grant
Lynn Nabers

On the part of the Senate—

Don Adams
Gene Jones
Kent Hance

(Verbatim copy of original document as received)

THE STATE OF TEXAS

SENATE AND
HOUSE OF REPRESENTATIVES

COMMITTEES OF THE WHOLE
IN JOINT MEETING
PURSUANT TO
H.C.R. NO. 2

MOTION TO QUASH SUBPOENA

TO THE PRESIDING OFFICER OF THE COMMITTEES OF THE WHOLE:

Comes now Ronald Earle, District Attorney of Travis County, Texas, and respectfully moves that the Honorable Presiding Officer quash the subpoena this day served on the movent for the following reason, to-wit:

That the witness subpoenaed is not a witness to any material fact and further the only knowledge that this witness has of the facts in this case constitute the work product of the Travis County District Attorney's office, which said office is responsible for the prosecution of Cause No. 53,180 and Cause No. 53,181 styled The State of Texas v. Donald B. Yarborough, presently pending in the 147th Judicial District Court of Travis County, Texas.

Dated: July 13, 1977

Respectfully submitted,

/s/Ronald Earle

(Motion denied
7-13-77
Ray Farabee)

(Verbatim copy of original document as received)

IN THE MATTER OF
DONALD B. YARBROUGH

MOTION TO QUASH SUBPOENA

TO THE HONORABLE PRESIDING OFFICER OF THE JOINT MEETING OF THE COMMITTEE OF THE WHOLE SENATE AND THE COMMITTEE OF THE WHOLE HOUSE OF THE LEGISLATURE OF THE STATE OF TEXAS:

COMES NOW Davis Grant, General Counsel of the State Bar of Texas, and moves that the subpoena served upon him in the above entitled matter on July 13, 1977, be quashed, and for grounds would respectfully represent and show as follows:

I.

That he is currently an attorney of record in Cause Number 1,098,095, styled The State of Texas v. Donald B. Yarbrough, currently pending before the 113th Judicial District Court of Harris County, Texas, which involves the same subject matter and same accused as the instant action, and he must therefore respectfully decline on the basis of an existing attorney-client relationship in that suit.

II.

All items sought by YARBROUGH with the exception of audio tapes, if there be any, constitute work product of counsel in Cause Number 1,098,095 as aforesaid, and are not subject to discovery by YARBROUGH.

WHEREFORE, premises considered, Davis Grant respectfully requests the subpoena issued to him be quashed.

Respectfully submitted,

/s/Dan Moody, Jr.
GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD
23rd Floor, Austin National
Bank Tower
Austin, Texas 78701

ATTORNEY FOR DAVIS GRANT

(Granted
7-13-77
Ray Farabee)

(Verbatim copy of original document as received)

IN THE MATTER OF

DONALD B. YARBROUGH

ORDER

On this __ day of July, 1977, came on to be considered the MOTION TO QUASH SUBPOENA of Davis Grant, General Counsel of the State Bar of Texas, and it appearing that the same is well taken, the subpoena should be and is hereby QUASHED.

Done this __ day of July, 1977.

Presiding Officer

Proponent's Exh. 17
sgn 7/15/77

July 15, 1977
Austin, Texas

TO THE MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS:

For many months I have fought the battle to continue my service on the Supreme Court - a position to which I was legally and duly elected - and to retain my right to follow my profession and life's work, the practice of law.

This fight has resulted in a complete collapse of my life's savings. Today, I have only my home which is heavily mortgaged. I can no longer pay the minimum expenses necessary to defend myself.

I have been told by numerous friends, some of whom are members of the legislature, that my removal from office is now assured, even before I have "my day in court". I accept this as being a fact of life. I do not accept it as being fair or equitable, or in the interest of preserving the constitutional government which I deem so essential for my children, and for the children of my fellow citizens.

Nevertheless, I have come to the conclusion that I should not and can not further subject myself or my beloved family to this ordeal.

I shall today deliver to the Governor my resignation as an Associate Justice of the Texas Supreme Court.

I hold no ill feeling toward anyone. I express my sincere appreciation to all who have helped me and the cause for which we have labored. I am grateful to those who elected me. I extend to each member of the Legislature my personal good wishes as they continue to serve our people.

Donald B. Yarbrough

DONALD B. YARBROUGH
ASSOCIATE JUSTICE OF THE
SUPREME COURT OF TEXAS

RECEIVED

July 15, 1977 JUL 15 PM 12 17

SECRETARY OF STATE
AUSTIN, TEXAS

Honorable Dolph Briscoe
Governor of Texas

Dear Sir:

The purpose of this letter is to advise and tender my resignation as Associate Justice of the Supreme Court of Texas, effective immediately.

It has been a pleasure to speak for what I believe to have been the best interests of the people during my tenure. My concern for their welfare will continue, and my prayers are with you as you consider the selection of my successor.

With warm personal regards, I am

Very Sincerely,

Donald B. Yarbrough

Witness this 15th day of July, 1977:

Waggoner Carr

Donald F. Nobles

Proponent's Exh. 18
sgc 7/15/77

STATE OF TEXAS
OFFICE OF THE GOVERNOR
AUSTIN

DOLPH BRISCOE
GOVERNOR

July 15, 1977

Honorable Ray Farabee
Presiding Officer of the Joint Session
of the 65th Legislature, First Called
Session sitting as Committees of the
Whole

Dear Senator Farabee:

You are advised that I have this date received, accepted and filed with the Office of Secretary of State the resignation of Donald B. Yarbrough as Associate Justice of the Supreme Court of Texas.

Sincerely,

Dolph Briscoe
Governor of Texas

cc: Lieutenant Governor William Hobby
Speaker Bill Clayton
Representative L. DeWitt Hale

Proponent's Exh. 17
sgc 7/15/77

00177

RECEIVED

STATE OF TEXAS 1977 JUL 15 PM 12 17

OFFICE OF THE GOVERNOR

AUSTIN

SECRETARY OF STATE
AUSTIN, TEXAS

DOLPH BRISCOE
GOVERNOR

July 15, 1977

The Honorable Mark White
Secretary of State
Capitol Building
Austin, Texas

Dear Mr. Secretary:

Please file the attached letter of resignation of Donald B. Yarbrough as Associate Justice of the Supreme Court of Texas which I have received and accepted this date.

Sincerely,

Dolph Briscoe
Governor of Texas

DB/gt

Proposed Sub. 19
agr 7/15/77

(Verbatim copy of original document as received)

**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

July 11, 1977

Honorable Gibson D. Lewis
Chairman, Committee on
Intergovernmental Affairs
House of Representatives
Austin, Texas 78711

Opinion No. H-1023

RE: Whether the Legislature may remove a judge in a special session.

Dear Representative Lewis:

You have asked that we advise you on the ability of the Legislature to include a "Resolution of Address" for the removal of Justice Donald Yarbrough in its order of business in special session of the Legislature.

Removal of judges by address is provided for in article 15, section 8 of the Texas Constitution. That section provides:

> The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each House respectively.

See also V.T.C.S. art. 5964.

If there is any barrier to considering removal of a judge by address during a special session, it is posed by article 3, section 40 of the Texas Constitution. That section provides:

> When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days.

See also Tex. Const. art. 4, sec. 8.

The precise question was considered in reference to impeachment by the Texas Supreme Court in Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924). The

House of Representatives filed articles of impeachment against Governor Ferguson during the Second Called Session of the Thirty-fifth Legislature. House Journal, 35th Leg., 2nd Called Sess., 78-104. The Senate trial began in the Second Called Session; Senate Journal, 35th Leg., 2nd Called Sess., 114; and was concluded in the Third Called Session. Senate Journal, 35th Leg., 3rd Called Sess., 996. Governor Ferguson argued that his failure to include impeachment in his proclamation convening the Second Called Session of the Legislature prevented the consideration of the subject.

The Supreme Court considered the nature of the impeachment function and specifically noted the similarity between impeachment and the criminal justice process. The Court concluded that the powers of impeachment

> are essentially judicial in their nature. Their proper exercise does not, in the remotest degree, involve any legislative function.
>
> ....
>
> Without a doubt, [the Legislature] may exercise them during a special session, unless the Constitution itself forbids. It is insisted that such inhibition is contained in article 3, section 40, which provides that legislation at a special session shall be confined to the subjects mentioned in the proclamation of the Governor convening it. This language is significant and plain. It purposely and wisely imposes no limitation, save as to legislation. As neither House acts in a legislative capacity in matters of impeachment, this section imposes no limitation with relation thereto, and the broad power conferred by article 15 stands without limit or qualification as to the time of its exercise.

Ferguson v. Maddox, supra at 890-891.

If removal by address is a judicial rather than a legislative process, it may be considered in a special session even if the Governor does not include the subject in his proclamation calling the Legislature into session.

On at least three occasions the Texas Supreme Court has indicated that removal by address is essentially a judicial proceeding. The Court said:

> In all of the methods provided for removal of a judge, the judge is entitled to a full and fair trial on the charges preferred against him.

Matter of Carrillo, 542 S.W.2d 105, 108 (Tex. 1976). And

> the judge is guaranteed a full and fair trial on the charges preferred against him, whether the charges be by way of articles of impeachment...or by way of legislative address to the Governor....

In re Laughlin, 265 S.W.2d 805, 808 (Tex. 1954), appeal dismissed sub. nom. Laughlin v. Wilson, 348 U.S. 859 (1954). And

> under every mode of removal expressly provided by (article 15) an officer is given the important safeguards of a trial, including formal

> written charges, notice, and an opportunity to be heard....Even by address of two-thirds of both Houses, the Governor cannot remove any judge until the written causes for removal are stated at length in the journals and have been 'notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass.'

Dorenfield v. State ex rel. Allred, 73 S.W.2d 83, 86 (Tex. 1934) (emphasis by court). The historical development of address is that it has become a quasi-judicial proceeding in which a hearing has been afforded. Shartel, Retirement and Removal of Judges, 20 Journal of the American Judicature Society 133, 147.

Since removal of judges by address is a quasi-judicial proceeding, the Legislature may utilize this procedure in a special session even if the subject is not included in the Governor's proclamation calling the Legislature into session.

SUMMARY

Removal of judges by address is a quasi-judicial proceeding and may be considered in a special session even if it is not included in the Governor's proclamation calling the Legislature into session.

Very truly yours,

/s/JOHN L. HILL
Attorney General of Texas

APPROVED:

/s/DAVID M. KENDALL, First Assistant

/s/C. ROBERT HEATH, Chairman
Opinion Committee

klw

TEXAS LEGISLATIVE COUNCIL

P.O. Box 12128, Capitol Station
Austin, Texas 78711
Telephone: 512/475-2736

July 12, 1977

MEMORANDUM

TO: Robert E. Johnson

FROM: Steve Collins

RE: Vote required for passage of address resolution

Article XV, Section 8, of the Texas Constitution provides for the removal of certain judges "on the address of two-thirds of each House of the Legislature." This raises the question as to whether this language means two-thirds of the membership or two-thirds of those present and voting. Unfortunately, there is no clear answer.

Arguments supporting two-thirds of membership:

Three arguments support a conclusion that the vote requires is two-thirds of the membership.

(1) The language of Article XV, Section 8, is identical to the language in Article III, Section 10, which provides that "[t]wo-thirds of each House" constitutes a quorum to do business. It is arguable that identical phrases in the constitution should be similarly construed, and the quorum provisions of Article III must mean two-thirds of the membership or would otherwise be meaningless. On the other hand, the language of the address provisions is not bound by the same necessity of meaning. In addition, the language of the address provisions is similar to that of Article III, Section 32, which requires a vote of "four-fifths of the House" to suspend the three-day rule. Both houses interpret that language to require only a vote of four-fifths of those present and voting.

(2) Although no case law has interpreted the vote requirement provisions of Article XV, Section 8, a similar statutory provision was construed in State v. Etheridge, 32 S.W.2d 828 (Tex. Comm. of Appeals—1930, opinion adopted). There the court construed statutory language which required a "two-thirds vote of the city council" for certain cities to take a particular action. Because the statute also provided that the city council was to be composed of five aldermen, the court held that "council" therefore meant all five aldermen and that "two-thirds of the city council" therefore meant two-thirds of those five aldermen rather than two-thirds of those present and voting. A similar situation exists in the Texas Constitution, where Article III, Section 2 states that the "House...shall consist of ninety-three members," and the "Senate shall consist of thirty-one members." Under the reasoning of Etheridge, a requirement of "two-thirds of each House" would therefore require two-thirds of the 93 or more representatives and two-thirds of the 31 senators.

(3) Senate Rule 31(a)(4) specifically requires that in the Senate, a two-thirds vote of the membership is necessary for adoption of a resolution addressing the governor to remove a judge.

Arguments supporting two-thirds of those present and voting:

Three arguments also support a conclusion that the vote required is two-thirds of the members present and voting.

(1) As previously noted, the language in Article III, Section 32, on suspension of the three-day rule is interpreted by both houses to mean four-fifths of those present and voting. That language is very similar to the address provisions.

(2) The impeachment provisions of Article XV, Section 3, require only a vote of "two-thirds of the Senators present," which may indicate a policy that that vote is sufficient for removal of public officers. On the other hand, it is also arguable that the silence as to the type of required vote in the address provisions contained in the same article negatively implies that the vote on removal by address is different from the vote required for conviction on impeachment. This negative implication argument is weak, however, when dealing with the Texas Constitution because of the wide variety of vote requirements. Some provisions specifically require a vote of two-thirds of all members elected (Article XVII, Section 1), while others specifically require a vote of two-thirds of the members present (Article IV, Section 12; Article XV, Section 3). Still others are like the address provisions and do not specify whether the two-thirds required is of the membership or of those

present (Article III, Section 10; Article IX, Section 1). There can generally be no negative implication drawn from the silence of these latter provisions as to the type of vote required because either of the preceding alternatives could be implied.

(3) Under House Rule XXVII, Mason's Manual of Legislative Procedure is considered authority when the rules are silent, as in this case. Section 512(3) of Mason's provides that unless otherwise specified, the requirement of a two-thirds vote means two-thirds of the legal votes cast, not two-thirds of the members present or two-thirds of all the members. However, the Texas authority which Mason cites for that proposition is English v. State, 7 Tex. App. 171 (1879). English involved a fact situation almost identical to the Etheridge case previously noted, but reached the opposite result. As an early court of appeals case, the English case was probably impliedly overruled by the Etheridge decision. The extent to which Mason's is appropriate authority is therefore questionable.

Previous address proceedings:

An examination of the votes in the house in the previous legislative attempts at removal on address is not helpful. In 1874, the removal of Judge Priest passed on a vote of 72 yeas and 10 nays, the removal of Judge Williamson passed on a vote of 69 yeas and 11 nays, and the removal of Judge Newcomb passed on a vote of 77 yeas and 4 nays. In the same year, the resolution addressing the governor to remove Judge Cooper failed on a vote of 39 yeas and 40 nays. In 1887, the resolution addressing the governor to remove Judge Willis passed the house on a vote of 67 yeas and 21 nays, with 5 absent, but failed in the senate on a vote of 5 yeas and 22 nays, with one absent. Those resolutions that passed were all approved by margins which exceeded the 62 votes representing two-thirds of the 93 members that made up the house at that time; those that failed did so on votes well under two-thirds of those present and voting.

Constitutional provisions in other states:

In addition, an examination of the provisions of other state constitutions providing for removal on address is not helpful. For example, the constitutions of both Maine and Massachusetts provide for removal on "address of both Houses"—apparently indicating a simple majority—while the constitutions of Kentucky and Maryland are identical to the Texas Constitution in requiring a vote of two-thirds of each hosue without specifying whether two-thirds of the membership or two-thirds of those present and voting is required.

Conclusion:

In reviewing the arguments on both sides of this question, the best case seems to be made for a conclusion that the vote required is two-thirds of the membership. At the very least, that ruling would be the one least subject to challenge.

TEXAS LEGISLATIVE COUNCIL

P.O. Box 12128, Capitol Station
Austin, Texas 78711
Telephone: 512/475-2736

July 15, 1977

MEMORANDUM

TO: Robert E. Johnson

FROM: Steve Collins

RE: Vote required for passage of address resolution

Two facts have come to my attention since my memorandum of July 12 on this subject that indicate that the vote required is two-thirds of the present and voting members.

(1) In the attempt to remove Judge Willis in 1887, the Constitution of 1876, which is our present constitution, required a vote of "two-thirds of each House" for passage of the address resolution. The House at that time consisted of 106 members, not 93 as stated in my previous memorandum. The resolution passed the House on a vote of 67 yeas and 21 nays, with 5 absent. It would have required 71 votes for passage if the vote had required two-thirds of the membership rather than two-thirds of those present and voting. Judge Willis demurred to the charges in the Senate on this point—that the constitutional vote requirement in the House had not been met—and the Senate overruled the demurrer. It appears, therefore, that both the Senate and the House at that time considered the constitutional requirement under this constitution to be a vote of two-thirds of those present and voting.

(2) In examining the previous Texas Constitutions, the constitutions of 1845, 1861 and 1866 required a vote of "two-thirds of each House." This provision was changed in the reconstruction Constitution of 1869 to a requirement of "two-thirds of the members elected to each House" (Article V, Section 10 and Article XII, Section 41). When the reconstruction constitution was rejected and the present constitution was adopted in 1876, the provision was changed back to the original "two-thirds of each House." It is arguable that the change in 1876 which deleted the language requiring a vote of members elected was a substantive change intended to make the vote requirement two-thirds of those present and voting. This argument is strengthened by comparing the 1874 and 1887 address proceedings. As noted in my earlier memorandum, the resolutions in 1874 all passed by more than two-thirds of the elected members; those proceedings were governed by the reconstruction constitution which required a vote of the membership. The resolution to remove Judge Willis in 1887 was governed by the present constitution, which deleted that requirement, and was passed by the House on a vote of two-thirds of those present and voting.

These two facts are significant enough to alter at least part of the conclusion in my earlier memorandum. The stronger case now seems to be made for the result that the vote requirement is two-thirds of those present and voting. However, a ruling that the vote required is two-thirds of the membership is still the least subject to challenge.

TO: ROBERT E. JOHNSON AND RON PATTERSON

FROM: DEBORAH BROWNING

SUBJECT: MAY THE SECRECY SURROUNDING GRAND JURY PROCEEDINGS BE BROKEN FOR THE PURPOSE OF SHOWING, AT A LEGISLATIVE ADDRESS HEARING, THE SUBSTANCE OF TESTIMONY BY THE OFFICER SOUGHT TO BE REMOVED BEFORE A GRAND JURY WHEN THE LISTED CAUSES FOR THE ADDRESS INCLUDE THAT OFFICER'S ALLEGED PERJURY BEFORE THE GRAND JURY

The judicial nature of legislative impeachment proceedings to remove a high state official is clear. Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924) recognized that the senate, as to impeachment, "is a court of original, exclusive, and final jurisdiction" when acting within its constitutional framework. Removal of a high state official by address to the governor is similar to impeachment. On this premise,

this memorandum assumes that evidence of testimony before a grand jury may be subpoenaed by the legislature for use at an address hearing to the extent that this evidence could be used in a judicial proceeding.

Article 19.35, Code of Criminal Procedure, 1965, as amended, contains the oath to be administered by grand jurors, and provides that the grand juror "shall keep secret [all such matters and things as shall be given him in charge], unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand jury room, in a criminal case, is under investigation." A witness before the grand jury and the grand jury bailiff are required to administer similar oaths, but analysis of the secrecy of grand jury proceedings in general has consistently centered on the grand juror's oath.

Article 20.02, Code of Criminal Procedure, 1965, as amended, provides that the deliberations of the grand jury are to be kept secret, and states that a grand juror or bailiff who divulges anything transpiring before him in the course of his official duties may be punished for contempt of court. That article does not state any exception which would allow testimony at a judicial proceeding investigating the truth or falsity of evidence given before the grand jury, but logic would dictate that a grand juror, being released from his oath in such a situation, would not be subject to punishment under that article.

Courts in construing these provisions, which have survived practically unchanged for over a century, have held that the secrecy of grand jury proceedings is not inviolate, and that the policy behind the secrecy may be overriden by other considerations. It is not error, nor is it a violation of the grand juror's oath, when a grand juror testifies about testimony given before the grand jury in a prosecution for perjury committed before the grand jury. Timmons v. State, 199 S.W. 1106 (Tex. Crim. App. 1917), Allen v. State, 199 S.W. 633 (Tex. Crim. App. 1917); Jones v. State, 174 S.W. 1071 (Tex. Crim. App. 1915); Wisdom v. State, 61 S.W. 926 (Tex. Crim. App. 1901).

Many cases have upheld the practice of putting a grand juror on the stand to testify about the substance of testimony by a witness before the grand jury in order to impeach the witness by showing that the testimony given by the witness at trial is different from the testimony of that witness before the grand jury. McMurray v. State, 148 S.W.2d 1096 (Tex. Crim. App. 1941); Burkhart v. State, 74 S.W.2d 692 (Tex. Crim. App. 1934); Polke v. State, 118 S.W.2d 793 (Tex. Crim. App. 1938); Claxten v. State, 251 S.W. 1106 (Tex. Crim. App. 1923); Rodgers v. State, 236 S.W. 748 (Tex. Crim. App. 1922); Lowe v. State, 226 S.W. 624 (Tex. Crim. App. 1921); Turner v. State, 51 S.W. 366 (Tex. Crim. App. 1899); Scott v. State, 5 S.W. 142 (Tex. Crim. App. 1887). Other cases stating this proposition are too numerous to list here.

Several early cases state that proof of prior contradictory statements before the grand jury of a witness at trial and proof of perjured testimony before the grand jury are the only purposes for which the state is authorized to show what a witness testified before the grand jury. These cases state that these are the only two situations which come within the exception contained within the literal terms of the grand juror's oath of secrecy. Christian v. State, 51 S.W. 903 (Tex. Crim. App. 1899); Gutgesell v. State, 43 S.W. 1016 (Tex. Crim. App. 1898). However, later cases have refused to limit penetration of the secrecy of the grand jury room to the literal terms of the grand juror's oath and have expanded the purposes for which grand jury matters can be unveiled. At least one of these cases relies on a penal statute that is now repealed that contained a broader exception to the requirement of secrecy than that contained in the grand juror's oath (Addison v. State, 211 S.W. 225 (Tex. Crim. App. 1919)), but most of these cases rely on a public policy argument to expand the penetration of grand jury secrecy. Davis v. State, 270 S.W. 165 (Tex. Crim. App. 1925); Mackey v. State, 151 S.W. 802 (Tex. Crim. App.

1912); Pierce v. State, 113 S.W. 148 (Tex. Crim. App. 1908); Smith v. State, 90 S.W. 37 (Tex. Crim. App. 1905); Galleges v. State, 85 S.W. 1150 (Tex. Crim. App. 1905); Giles v. State, 67 S.W. 411 (Tex. Crim. App. 1902).

Wisdom v. State, 61 S.W. 926 (Tex. Crim. App. 1901), the landmark case, provides that the purposes for which testimony before a grand jury may be unveiled include proof of perjury before the grand jury, impeachment of a witness at a trial by proof of his testimony before the grand jury which is at variance with his testimony at the trial, proof that some person other than these authorized to be in the grand jury room was present when an indictment was being considered, to show whether a full grand jury was present, to refresh a witness's memory on the trial of the case, and to show a confession or admission made before the grand jury. "Neither the rule of secrecy nor the oath of secrecy which grand jurors are required to take prevents the public or an individual from proving by one or more of the grand jurors in a court of justice what passed before the grand jury, where, after the purpose of secrecy has been affected, it becomes necessary to the attainment of justice and the vindication of truth and right, in a judicial tribunal, that the conduct and testimony of prosecutors and witnesses shall be inquired into." Id. at 927.

Huntress v. State, 88 S.W.2d 636 (Tex. Civ. App. San Antonio 1935, writ dism'd) provided that members of a grand jury who had presented an indictment charging a county clerk with a felony were not disqualified from making an affidavit authorizing the institution of proceedings to remove the county clerk from office based on the facts they learned as grand juror and did not violate their oath of secrecy in doing so, and the affidavit was not defective on that ground. That case stated:

"It seems clear to us that the statutes relating to the secrecy of the work of grand juries, and providing for punishment of those who violate such laws, were enacted for very definite purposes, and primarily that of safeguarding the rights of the innocent; expediting the investigation of law violations, and the prompt apprehension of criminals; and especially to encourage citizens to feel free to give information, and otherwise to properly assist those charged with the important and difficult duty of enforcing the criminal laws. It does not occur to us that the laws enacted for such important public purposes should be construed to protect wrongdoers; thwart, if not defeat, the investigation and apprehension of criminals and to discourage law-abiding citizens from properly co-operating with law enforcement officers in their efforts to enforce the laws intended to protect the public." Id. at 641.

The opinion describes the state of affairs at the time the grand jurors made the affidavit:

"[D]efendant had already been indicted for the alleged wrongdoing in public office; the indictment had been published, and the charged contained therein were therefore officially and definitely filed in the public records of the county. Apparently there was at such time no secret as to the charges which had been investigated in the grand jury room. At the same time, the defendant...was still in office and in full charge and control of the affairs and finances of an important public office. It seems to us that under such circumstances, and in full keeping with the true purposes and integrity of all laws relating to the operation of grand juries in this state, the grand jurors...were not only justified and authorized to do so, but in truth and in fact it was their public and official duty, under such peculiarly grave circumstances, to take such lawful action as might be necessary and proper to safeguard the public interest and the integrity of public office...." Id. at 642.

Clearly a transcript of testimony before the grand jury can be used in a judicial proceeding to the same extent that the testimony contained in the transcript could be shown through the mouth of a grand juror. Garcia v. State, 454 S.W.2d 400 (Tex. Crim. App. 1970); Pierce v. State, 113 S.W. 148 (Tex. Crim. App. 1908); Hindman v. State, 85 S.W. 1150 (Tex. Crim. App. 1905); Giles v. State, 67 S.W. 411 (Tex. Crim. App. 1902); Parker v. State, 65 S.W. 1066 (Tex. Crim. App. 1901). In some cases the testimony before the grand jury has been shown in subsequent judicial proceedings by the testimony of the prosecuting attorney who appeared before the grand jury. Mackey v. State, 151 S.W. 802 (Tex. Crim. App. 1912); Jones v. State, 174 S.W. 1071 (Tex. Crim. App. 1915). Any limitation on the exposure of grand jury testimony imposed by the grand juror's oath of secrecy seems inapplicable when the state seeks to prove grand jury testimony by means of a transcript of that testimony or the testimony of the prosecuting attorney who appeared before the grand jury. No cases were found to support this proposition.

In summary, the extent to which testimony before a grand jury may be exposed at a judicial proceeding is not contained within the literal limits of the grand juror's oath of secrecy, and public policy dictates that many other considerations override the secrecy of grand jury proceedings. Even so, the exception to the juror's oath contained within the literal terms of that oath clearly released a grand juror from his promise of secrecy when an alleged perjury before the grand jury is under investigation at a subsequent judicial proceeding. The extent to which a transcript of a grand jury proceeding or testimony of a prosecuting attorney can be used to prove the substance of testimony given at a grand jury proceeding is at least the same as, and may exceed, the extent to which a grand juror can testify for that purpose. Therefore a grand juror, a transcript of a grand jury proceeding, or a prosecuting attorney can be subpoenaed for the purpose of providing evidence at a judicial proceeding investigating perjury before the grand jury in the face of resistance which is based on the secrecy of grand jury proceedings, since that secrecy is not an obstacle in those circumstances.

(Verbatim copy of original document as received)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD B. YARBROUGH,
Plaintiff

VS. NO. _____

MEMBERS OF THE HOUSE OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS; AND DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AS A GROUP AND INDIVIDUALLY,
Defendants

ORIGINAL COMPLAINT FOR DECLARATORY RELIEF, TEMPORARY RESTRAINING ORD PRELIMINARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Donald B. Yarbrough, Plaintiff herein, and complains of the members of the House of Representatives and Senate of the State of Texas and Dolph Briscoe, Governor of the State of Texas, as a group and individually, Defendants herein, and for cause of action alleges as follows:

I.

Plaintiff Donald B. Yarbrough is a resident of Travis County, Texas and is a duly elected Associate Justice of the Supreme Court of Texas.

II.

The members of the House of Representatives and Senate of the State of Texas and Dolph Briscoe, Governor of the State of Texas are officers, agents and servants of the State of Texas sitting in Travis County, Texas.

III.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1343(3), (4) and Title 42 U.S.C. Section 1983 and 1985(3), this being an action authorized by the laws of the United States to redress by injunctive relief the deprivation, under color of State law, of rights, privileges and immunities secured to Plaintiff by the Constitution of the United States, particularly the fourteenth Amendment thereto.

IV.

This is an action by which Plaintiff seeks injunctive relief to restrain action by Defendants to remove him from the office of Associate Justice of the Supreme Court of Texas. Said action would be accomplished under color of State law, i.e. Article 15, Section 8, Texas Constitution, which provides as follows:

"The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each House respectively."

V.

This is also an action wherein Plaintiff is seeking a declaration of his rights under the Constitution and laws of the United States and under Title 28, U.S.C., Section 2201 and Section 2202; that this Court, in a case of controversy within its jurisdiction, may declare the rights of Plaintiff seeking such a declaration.

VI.

On July 11, 1977, the House of Representatives and Senate of the State of Texas met respectively, in their chambers, and both passed resolutions to hold a hearing in their presence sitting as a committee of the whole commencing at 9:00 o'clock a.m. on Friday, July 15, 1977. This resolution is known as H.C.R. No. 2, a copy of which is attached hereto as Appendix 1.

The purpose of the hearing is to hear evidence in order to address the Governor of the State to remove Plaintiff from the office of Associate Justice of the Supreme Court of Texas. The Committee of the whole will consider a resolution filed in the House of Representatives on July 5, 1977, known as H.C.R. No. 1, a copy of which is attached hereto as Appendix 2, which compels the Governor to remove Plaintiff from office.

VII.

The acts of the House of Representatives and Senate on July 11, 1977, as well as the acts of both to be done beginning July 15, 1977, were and are to be performed under color of law, and therefore, constitute acts of the State of Texas within the meaning of the Fourteenth Amendment of the United States Constitution.

VIII.

Plaintiff would show this Court the acts of Defendants infringe upon his right to due process guaranteed him by the Fourteenth Amendment.

1. Removal by address under Article 15, Section 8, of the Texas Constitution is not the proper procedure to be used by Defendants in removing Plaintiff from office. Article 15, Section 8, attempts to be explicit in its definition of grounds for removal from office by address to the Governor. The only applicable ground in this case is "other reasonable cause which shall not be sufficient ground for impeachment." The charges against Plaintiff stated in H.C.R. No. 1 (Appendix 2) are for criminal offenses. For two of the three offenses stated therein, Plaintiff has already been charged by indictment but has not been tried. The charges against Plaintiff are impeachable offenses because they are of such serious nature and necessarily deal with his fitness to hold office. In an impeachment trial, Plaintiff would be entitled to be tried by the Senate upon their oaths to be impartial under Article 15, Section 3, Texas Constitution. Therefore, the denial of an impeachment trial deprives Plaintiff of fundamental due process.

2. The procedure to be followed in removal by address herein deprives Plaintiff of fundamental fairness which is necessarily required in due process. Due process is mandated in the acts to be done by Defendants because Plaintiff is subjected to the forfeiture of a property right. Fundamental fairness is denied to Plaintiff in the procedure of removal by address because the same body, i.e. Defendants, both prosecute and decide the charges against Plaintiff. Fundamental fairness is likewise denied Plaintiff because the triers of fact, Defendants, are biased and prejudiced against Plaintiff.

3. Plaintiff is denied due process because he is not put upon sufficient notice of the grounds for removal by address. The wording "other reasonable cause which shall not be sufficient ground for impeachment" is unconstitutionally broad, vague and indefinite.

4. Plaintiff is denied due process by the procedure of removal by address because the nature of the charges against him and the publicity to be derived from such a hearing will irreparably prejudice his right to a fair trial in the criminal proceedings pending against him.

IX.

Plaintiff would further show this Court that the acts of Defendants deny his right to equal protection of the law guaranteed him by the Fourteenth Amendment to the United States Constitution in that removal of Plaintiff from office without

trial by an impartially sworn body is provided to all other state officers under Article 15, Section 7, of the Texas Constitution but not to the class of state officer to which Plaintiff belongs. Such classification of state officers is founded upon no substantial and reasonable grounds.

X.

All of the aforesaid acts of Defendants will cause irreparable and permanent harm to Plaintiff unless Defendants are immediately restrained from:

1. Conducting a hearing by a committee of the whole Legislature of Texas on July 15, 1977, pursuant to Defendants' consideration of the removal of Plaintiff from his office;
2. Voting on and delivering to Dolph Briscoe, Governor of Texas, the resolution known as H.C.R. No. 1;
3. Taking any action as separate houses, or jointly, calculated to remove Plaintiff from the office of Associate Justice of the Supreme Court of Texas, pursuant to Article 15, Section 8, of the Texas Constitution.

WHEREFORE, Plaintiff prays as follows:

1. For a judgment declaring Article 15, Section 8, of the Texas Constitution on its face and as utilized and applied by Defendants herein is in violation of Plaintiff's rights to due process and equal protection of the law guaranteed him by the Fourteenth Amendment to the United States Constitution, and is therefore unconstitutional, null and void.

2. For a temporary restraining order and preliminary injunction against Defendants from:

a. Conducting a hearing by a committee of the whole Legislature of Texas on July 15, 1977, pursuant to Defendants' consideration of the removal of Plaintiff from his office;
b. Voting on and delivering to Dolph Briscoe, Governor of Texas, the resolution known as H.C.R. No. 1;
c. Taking any action as separate houses, or jointly, calculated to remove Plaintiff from the office of Associate Justice of the Supreme Court of Texas, pursuant to Article 15, Section 8, of the Texas Constitution.

3. For a permanent injunction enjoining Defendants from:

a. Conducting a hearing by a committee of the whole Legislature of Texas on July 15, 1977, pursuant to Defendants' consideration of the removal of Plaintiff from his office;
b. Voting on and delivering to Dolph Briscoe, Governor of Texas, the resolution known as H.C.R. No. 1;
c. Taking any action as separate houses, or jointly, calculated to remove Plaintiff from the office of Associate Justice of the Supreme Court of Texas, pursuant to Article 15, Section 8, of the Texas Constitution.

Respectfully submitted,

/s/WAGGONER CARR

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ATTORNEYS FOR PLAINTIFF
DONALD B. YARBROUGH

THE STATE OF TEXAS
COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared DONALD B. YARBROUGH, and after being duly sworn by me, on his oath states that he has read the foregoing document and that the statements therein are true and correct.

/s/DONALD B. YARBROUGH

SWORN TO AND SUBSCRIBED before me, on this the 13th day of July, 1977.

/s/Maudie A. Johns
Notary Public in and for
Travis County, Texas

(Verbatim copy of original document as received)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD B. YARBROUGH,
Plaintiff
VS.

No. ___

MEMBERS OF THE HOUSE OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS: AND DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AS A GROUP AND INDIVIDUALLY,
Defendants

MOTION FOR TEMPORARY RESTRAINING ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Donald B. Yarbrough, Plaintiff herein and requests the Court to grant the temporary restraining order herein pursuant to Rule 65(b), F.R.C.P. against Defendants and as grounds therefor would show the Court the following:

1. On July 11, 1977, Defendants met in their respective chambers and voted to conduct a hearing to remove Plaintiff from his office by address to the Governor under Article 15, Section 8, of the Texas Constitution. The hearing before Defendants is to be held July 15, 1977. A copy of Defendants resolution was delivered to Plaintiff on July 11, 1977.

2. Plaintiff is accused by Defendants of three criminal acts and notice of only three days is not sufficient to prepare a defense to said charges.

3. Plaintiff contends in his Original Complaint that the procedure to remove him from office denies him his rights guaranteed by the Fourteenth Amendment to the United States Constitution.

4. Immediate and irreparable injury will result to Plaintiff if the action to remove Plaintiff from office is not restrained by this Court because once removed from office there is no remedy in Texas law for reinstatement to that office.

5. Oral notice has been given to Defendants herein.

WHEREFORE, Plaintiff prays the Court grant a temporary restraining order immediately without further notice restraining Defendant from:

a. Conducting a hearing by a committee of the whole Legislature of Texas on July 15, 1977, pursuant to Defendants' consideration of the removal of Plaintiff from his office;

b. Voting on and delivering to Dolph Briscoe, Governor of Texas, the resolution known as H.C.R. No. 1;

c. Taking any action as separate houses, or jointly, calculated to remove Plaintiff from the office of Associate Justice of the Supreme Court of Texas, pursuant to Article 15, Section 8, of the Texas Constitution.

Respectfully submitted,

/s/WAGGONER CARR

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ATTORNEYS FOR PLAINTIFF
DONALD B. YARBROUGH

THE STATE OF TEXAS
COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared DONALD B. YARBROUGH, and after being duly sworn by me, on his oath states that he has read the foregoing document and that the statements therein are true and correct.

/s/DONALD B. YARBROUGH

SWORN TO AND SUBSCRIBED before me, on this the 13th day of July, 1977.

/s/Maudie A. Johns
Notary Public in and for
Travis County, Texas

(Verbatim copy of original document as received)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD B. YARBROUGH,
Plaintiff
VS. No. ___

MEMBERS OF THE HOUSE OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS: AND DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AS A GROUP AND INDIVIDUALLY,
Defendants

PLAINTIFF'S BRIEF IN SUPPORT OF HIS REQUEST FOR INJUNCTIVE RELIEF

In his complaint filed herein, Plaintiff has moved the Court to grant him injunctive judgment and in support of that motion, Plaintiff files his brief.

AUTHORITIES

The Texas Constitution provides that "Judges of the Supreme Court...shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient grounds for impeachment....", Texas Constitution Article 15, Section 8.

The phrase "or other reasonable cause which shall not be sufficient ground for impeachment," necessarily excludes "impeachable causes" from "other reasonable causes" under the accepted rule of construction that every clause should be given the meaning of the language employed. See Missouri-Kansas-Tex. R. Co. of Texas v. Thomason, 280 S.W. 325, 327 (Civ. App. Texas. - Austin, 1926), writ ref.

In an action to remove a sheriff from office in the District Court, the Texas Court of Civil Appeals held "causes for removal may not be extended by the courts or by statutes not expressly authorized by the Constitution." State v. Harney, 164 S.W.2d 55, 56 (Tex. Civ. App. 1942) writ ref.

The phrase "sufficient ground for impeachment" is not defined in the Texas Constitution. The Supreme Court of Texas has construed impeachment causes as "...such official delinquencies, wrongs, or malfeasances as justified impeachment according to the principles established by the common law and the practice of the English Parliament and the parliamentary bodies in America." Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924).

The early common law did not provide for impeachment. A. Simpson, A Treatise on Federal Impeachments, 5 (1916).

The phrase "high crimes and misdemeanors" had been used as a cause for impeachment in England since the Fourteenth Century. See P.V. Rodino, High Crimes and Misdemeanors, 18 (1973). Of all of the comparatively few impeachments in England in the Eighteenth Century, in nearly all such impeachments the phrase "high crimes and misdemeanors" occurs. P.V. Rodino, High Crimes and Misdemeanors, 5 (1973).

The United States Constitution provides that impeachable causes include "high crimes and misdemeanors." United States Constitution Article 2, Section 4.

Many of the constitutions of the sister states of Texas provide that impeachable causes include "high crimes and misdemeanors".

"High crimes and misdemeanors" are sufficient causes for impeachment under the Texas Constitution; and, therefore "high crimes and misdemeanors can not be proper causes for address under the Texas Constitution.

Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, has been accused under House Concurrent Resolution Number One and Senate Concurrent Resolution Number One, both filed in the State of Texas, Sixty-fifth Legislature, First Called Session, of aggravated perjury, forgery, and solicitation to commit capital murder.

"High crimes and misdemeanors" in England have included "a wide range of criminal and non-criminal offenses" P. V. Rodino, High Crimes and Misdemeanors, 18 (1973).

The Texas House of Representatives Select Committee on Impeachment concluded, "...in the United States, it was never intended that the impeachment grounds be restricted to that conduct which was criminal in nature", Texas Legislature House of Representative, Select Committee on Impeachment Report, to the Speaker and the House of Representatives 8 (1975).

Aggravated perjury is a violation of the Texas Penal Code, V.T.C.A. Penal Code, Section 37.03.

Forgery is a violation of the Texas Penal Code, V.T.C.A. Penal Code, Section 32.21.

Solicitation is a violation of the Texas Penal Code, V.T.C.A. Penal Code, Section 15.03.

The causes alleged in H.C.R. No. 1 and S.C.R. No. 1, are "high crimes and misdemeanors" which are causes for impeachment and not causes for address.

If the address system is used to remove Plaintiff from his office, he will be denied property and liberty. Therefore, the procedure requires due process. U.S. CONST. Amend. V, XIV. The Plaintiff's right to his office as an elected official, to his job, and to his means of livelihood is his property interest. It has been stated that "...an elected official 'has a property right in his office which cannot be taken away except by due process of law." Gordon v. Leatherman, 450 F.2d 562, 565 (5th Cir. 1971). Courts in Texas have also ruled that "(p)ublic office is property." Standley v. Aldine Independent School District, 271 S.W.2d 132, 136 (Tex. Civ. App.—Waco, 1954, 1954, Rev'd on other grds. 280 S.W.2d 578).

The Plaintiff also risks loss of liberty. If Plaintiff is removed by the process of address, he will be stigmatized in that his reputation will suffer irreparably and the action would preclude many job opportunities. If "deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge 'then the requirements of due process must be adhered to. Velger v. Cawley, 525 F. 2d 334, 336 (2nd Cir. 1975). The minimum requirements of due process and hearing are applicable '(w)here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him.' Wisconsin v. Contantineau, 400 U.S. 433, 437 (1971).

The bare minimum requirement of due process, such as in an administrative hearing where a person's job is at stake, is that the person be given "notice and a hearing". Rolles v. Civil Service Commission, 512 F.2d 1319, 1327 (2nd Cir. 1975). Such notice must be timely, "and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Plaintiff was notified of a letter dated July 5, 1977, by the Speaker of the Texas House of Representatives that Plaintiff should be prepared to appear before the Legislature on July 15, 1977 at 9:00 a.m. There was no personal service, and therefore the notice was inadequate. Even if notice was received on that day, it did not give Plaintiff adequate time to prepare his defense. A ten day period is insufficient in lieu of the grievous nature of the charges, and the possible outcome of relieving Plaintiff from an elected state position. Also, the notices given were inadequate and vague as to what Plaintiff is charged with, and how he is to defend himself.

However, more than just the basic requirements of due process must be met in this proceeding. The address in analagous to a disbarrment case in that it seeks to remove Plaintiff from his livelihood. Disbarrment cases are quasi-criminal in nature. In Re Ruffalo, 390 U.S. 544, 551 (1968). Therefore, criminal standards of due process are required. The rules as to procedure, as stated in H.C.R. No. 2 are inadequate to effectuate such due process requirements.

requires an absence of actual bias in the trial of cases." In Re Murchison, 349 U.S. 133, 136 (1955). Such fairness cannot be met by the system of address. Because of the multitude of adverse publicity on this matter, the Plaintiff cannot hope to receive a fair and impartial hearing. Some Legislators have publicly announced their positions on the matter. Austin American Statesman, July 12, 1977, p. BI. Nor is there any voir dire granted in the procedural rules (H.C.R. No. 2) to preclude such biased members from voting on the matter. Such a scheme precludes the fundamental fairness required by due process. The structure of the address system also precludes fairness. The Legislature will sit as indictor, prosecutor, judge and jury. . An "impartial decision maker is required by due process". Arnett v. Kennedy, 416 U.S. 134, 198 (1974). Such impartiality cannot be assured. A body that must rule on motions, decide what evidence will be let in and prosecute the case, cannot then sit as an impartial decisionmaker. Their "interest in the controversy" precludes them from a decisionmaking role. Tumey v. State of Ohio, 273 U.S. 510, 522 (1927). Fundamental fairness, as required by due process, cannot be met in an address proceeding, because of the bias of the legislators due to adverse publicity, and because of the bias that must result from the Legislature's contradictory roles as prosecutor, judge and jury in the hearing.

The Constitution of Texas provides in Article 15, Section 7, that if the modes of removal from office of any State officer have not been provided in the Constitution, then before removal of any such officer, such officer has the right to a trial.

The courts have held that "Unequal treatment of persons under a state law which is founded upon unreasonable and unsubstantial classification constitutes discriminatory state action and violates both the state and federal constitutions. Gilliland v. State, 342 S.W.2d 327 (C.C.A. Tex. 1961) no writ.

The separate classification of an Associate Justice of the Supreme Court of Texas vis a'vis the classification of all other State officers as described in Article 15, Section 7, is founded upon unreasonable and unsubstantial classification. Moreover, such unreasonable and unsubstantial classification works to allow an appointed officer whose mode of removal is not otherwise provided by the Constitution, the right to a trial before removal. The trial right is not provided for Plaintiff because of the classification which denies his equal protection of law guaranteed by the United States Constitution.

ARGUMENT

The drafter of the Texas Constitution provided for removal of Supreme Court Judges by address and impeachment. While the causes for impeachment are not expressed, the causes for address are. The purpose of providing causes for address was to limit the use of address to the causes stated in the Constitution. The intention of the drafters of the Constitution was to provide for a hearing in case of address. The use of a trial is reserved for all cases except for wilful neglect of duty, incompetency, habitual drunkenness or oppression in office, in which the reasonable cause for removal is not sufficient ground for impeachment.

The charges of aggrevated perjury, forgery and solicitation to commit capital murder constitute causes for impeachment; but not causes for address.

Due process applies to the procedure of address because plaintiff risks being divested of his property and liberty. The minimum requirements for due process are notice and fair hearing. Notice in this case was inadequate because it was not timely, did not allow the plaintiff adequate time to respond, and was inadequate because it was vague as to the charges and to how plaintiff was to defend himself. But criminal standards of due process must be met because address is analagous to disbarment, which is a quasi-criminal proceeding. Due process is lacking because the Legislature has not assented to all of the due process requirements mandated by a trial of such a quasi-criminal nature.

Such an address also violates plaintiff's due process rights because of the pending criminal trial in which he is involved. Both address and criminal proceedings deal with the same charges. The hearing at the address will prejudice plaintiff's defense in the criminal trial by disclosing evidence for in advance of the criminal trial.

Due process requires fundamental fairness. Plaintiff cannot receive a fair hearing through address. The legislators have been subjected to much adverse publicity, and some have publicly voiced their biases. The structure of address itself precludes fairness because the Legislature must be a judge, jury, and prosecutor. In prosecuting and trying the case, the legislature will develop an interest in it, which will make it impossible for them to act as impartial decisionmakers.

Other officers of the State whose mode of removal is not otherwise provided for, are as a class provided the right of trial before removal. The placement of an elected State office holder into a class which is not provided the right of trial before removal is an unreasonable and unsubstantial classification that provides for unequal treatment and is a violation of the United States Constitution.

Respectfully submitted,

/s/WAGGONER CARR

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ATTORNEYS FOR PLAINTIFF
DONALD B. YARBROUGH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand delivered this 13th day of July, 1977 to the Honorable Robert Maloney, Chief Prosecutor, at the State Capitol, Austin, Texas.

/s/Bob Blinderman

(Verbatim copy of original document as received)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD B. YARBROUGH,
Plaintiff
VS. | NO. A 77 CA 131

MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS: AND DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AS A GROUP AND INDIVIDUALLY,
Defendants

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS REQUEST FOR INJUNCTIVE RELIEF

In regard to "Cause of Address" under Article 15, Section 8, of the Texas Constitution, Plaintiff hereby submits his Supplemental Brief.

The Texas Constitution provides in Article 15, Section 8 that a judge of the Supreme Court may be removed from office by address. Address is a process requiring two-thirds (2/3) vote by each House of the Legislature affirming resolutions that direct the Governor to remove a person from office. The relevant cause in the instant case is encompassed in the Constitution phrase, "...or other reasonable cause which shall not be sufficient ground for impeachment."

In order to determine if a cause for address is, in fact, a proper cause, one must answer the questions: "What is a sufficient ground for impeachment?" and "Can a ground that is sufficient for impeachment be a cause for address?"

Taking the latter question first, the answer "no" is ascertained by applying accepted rules of Constitutional construction and interpretation.

> "It is a rule for the construction of constitutions, constantly applied, that where a power is expressly given and the means by which, or the manner in which, it is to be exercised, is prescribed, such means or manner is exclusive of all others." Parks v. West, 111 S.W. 726, 727 (Tex. 1908).

"It is a well-known rule, sanctioned by all legal authority, that, where the Constitution provides how a thing may or shall be done, such specification is a prohibition against its being done in any other manner. This is but the application of the familiar rule that the expression of one thing is the exclusion of any other, and, therefore, is decisive of legislative authority." Ex parte Massey, 92 S.W. 1086, 1087 (Tex. Crim. App., 1905).

"When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases." Holley v. State, 14 Texas. App. 505.

The inescapable conclusion is that the intention of the drafters of the Texas Constitution was that if a cause is ground for an impeachment, that same cause cannot be ground for an address.

The first question, "What is a sufficient ground for impeachment", was answered, albeit not definitely, by the Texas Supreme Court, when it held impeachment causes to be:

"...such official delinquencies, wrongs, or malfeasances as justified impeachment according to the principles established by the common law and the practice of the English Parliament and the parliamentary bodies in America." Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924).

The early common law did not provide for impeachment. A. Simpson, A Treatise on Federal Impeachments, 5 (1916).

In England from 1283, Parliament and the king engaged in a continuous battle for power. The power of impeachment finally rested in Parliament in 1399 and continued to be so established until after the Federal Convention in 1787 and the Constitution of the United States was promulgated. A. Simpson, A Treatise on Federal Impeachments, 5-7 (1916).

The phrase "high crimes and misdemeanors" had been used as a cause for impeachment in England since the Fourteenth Century. See P. V. Rodino, High Crimes and Misdemeanors, 18 (1973). Of all of the comparatively few impeachments in England in the Eighteenth Century, in nearly all such impeachments the phrase "high crimes and misdemeanors" occurs. P. V. Rodino, High Crimes and Misdemeanors, 5 (1973).

The United States Constitution provides that impeachable causes include "high crimes and misdemeanors." United States Constitution, Article 2, Section 4.

"A lesser issue was the definition of impeachable crimes. In the original proposals, the President was to be removed on impeachment and conviction 'for mal or corrupt conduct,' or for 'malpractice or neglect of duty.' Later, the wording was changed to 'treason, bribery or corruption,' and then to 'treason and bribery' alone. Contending that 'treason and bribery' were too narrow, George Mason proposed adding 'mal-administration,' but switched to 'other high crimes and misdemeanors against the state' when Madison said that 'mal-administration' was too broad. A final revision made impeachable crimes 'treason, bribery or other high crimes and misdemeanors." Cong. Quarterly, 2

The foregoing analysis raises the question: What are 'high crimes and misdemeanors'?" "High crimes and misdemanors" in England have included "a wide range of criminal and non-criminal offenses". P.V. Rodino, High Crimes and Misdemeanors, 18 (1973).

There are two views as to what "high crimes and misdemeanors" are. The narrow view is that only serious indictable criminal offenses are "high crimes and misdemeanors."

"Nothing but treason, official bribery, or other high crimes and misdemeanors made so by law, and also in their nature of deep moral

turpitude, which are dangerous to the safety of the state, and which palably disqualify and make unfit an incumbent to remain in the office of President, can justify the application of this clause." Trial of Andrew Johnson, 175.

"Impeachment is defined as a criminal proceeding without the right of a trial by jury. It is not alone in form, but also in substance, a criminal prosecution." State v. Buckley, 54 Ala. 599.

"But an impeachment before the lords by the commons of Great Britain in parliament is a prosecution of the already known and established law, and has been frequently put in practice, being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand interest of the whole kingdom." Blackstone (4 Comm. 259)

"...crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it." (Blackstone's Commentaries, Bk. IV, Ch. 1.)

"Impeachment proceedings are regarded by the court as criminal proceedings, and if provided for in the Constitution, are to be governed by any constitutional provisions which regulate criminal proceedings." 29 CVC 1414.

"...it is settled in England that an impeachment is only regular and lawful as a mode of presenting, trying, and conviction for an indictable offense;" Pomeroy's Const. Law (1870)

"The trial being in its nature criminal, the prosecution must bring itself within the rule in such cases and prove the accused guilty beyond a reasonable doubt." Ford's Jefferson, vol. 7, 192, 194, 195, 198, 199.

The older view that only serious crimes are "high crimes and misdemeanors" has been eroded by the broader, modern view that "high crimes and misdemeanors" include any serious misconduct of the office holder.

"In the English practice and in several of the American impeachments, the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct...Impeachment was evolved...to cope with both the inadequacy of criminal standards and the impotence of the courts to deal with the conduct of great public figures. It would be anomalous if the framers, having barred criminal sanctions from the impeachment remedy...intended to restrict the grounds for impeachment to conduct that was criminal." Congressional Quarterly, 2 (March, 1974).

"In drawing up articles of impeachment, the House has placed little emphasis on criminal conduct. Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word 'criminal' or 'crime' to describe the conduct alleged...
"Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions...'All have involved charges of conduct incompatible with continued performance of the office. Some have explicitly rested upon a course of conduct...Some of the individual articles seem to have alleged conduct that, taken alone, would not have been considered serious...' Congressional Quarterly, 2 (March, 1974).

"While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct —undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. Clearly, these effects can be brought about in ways not anticipated by the criminal law.

"Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office; not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office." M. B. Schnapper, Presidential Impeachment, 28 (1974).

"Rep. Gerald R. Ford (R. Mich.) who, in proposing the impeachment of Supreme Court Justice William O. Douglas on April 15, 1970, declared: 'An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history: conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office.'" Congressional Quarterly, 6 (March, 1974).

The meaning of "high crimes and misdemeanors" is evolving from a narrow definition of substantial serious violations of the criminal law to a broad definition of conduct substantially or seriously incompatible with governmental principles or performance of the duties of office.

This evolution can be attributed to the following circumstances:

1. The conduct of those who hold office has been subjected to closer scrutiny and greater publicity as the right of the public to information and right of the press to seek out information increases.
2. The marketing of "scandal" has increased due to improved technology, intensified capital in the media sector.
3. The demand for "scandal" has increased due to a better educated and more sophisticated public.
4. The transfer of power from those possessing Devine rule to a representative democracy.
5. Garning acceptance of the philosophy that an effective deterrent to proscribe conduct is harsh punishment.
6. Lack of a reasonable alternative, i.e., address.

The resulting anomoly is that while rights of the "underprivileged" criminally accused citizens has been an expanding concept, the rights of the "privileged" accused citizens has been a decreasing concept!

The trend in the United States of accepting the broader definition of "high crimes and misdemeanors" has been exemplified in Texas. Judge William Chambers was impeached by the Texas House of Representatives in 1874. The articles against him charged him with violations of the criminal laws of the State of Texas. Senate Journal, 300. This case is strong parliamentary precedent that crimes are causes for impeachment.

More than one hundred years later, the transition to the broader interpretation was adopted in Texas history.

The Texas House of Representatives Select Committee on Impeachment concluded, "...in the United States, it was never intended that the impeachment grounds be restricted to that conduct which was criminal in nature", Texas Legislature House of Representatives, Select Committee on Impeachment Report, to the Speaker and the House of Representatives, 8 (1975).

The United States Constitution does not provide for legislative address to remove an office holder; therefore, the broad definition is needed when an office holder "should" be removed from office because his conduct is incompatible with his remaining in office, notwithstanding his lack of criminal conduct. In comparison, the Texas Constitution provides two types of removal: impeachment to be used when the office holder commits impeachable offenses, i.e. treason, bribery, high crimes and misdemeanors, and address to be used when the office holder commits, among other things, offenses which are not treason, bribery or high crimes or misdemeanors.

A brief review of the Texas Constitutional history reveals the purpose or providing an address. Article 4, Section 8, of the Texas Constitution adopted in 1845, provided that Supreme Court judges could be removed by address "for wilful neglect of duty, or other reasonable cause, which shall not be sufficient ground for impeachment;". 2 Laws of Texas, 1285.

The same language was used again in the Texas Constitution of 1866 in Article 4, Section 11. 5 Laws of Texas 867.

In the Texas Constitution of 1869, Article 5, Section 10, used the same language except the words, "for incompetency, neglect of duty, or other reasonable causes" were substituted for the words "for wilful neglect of duty." 7 Laws of Texas 412.

Today, the Texas constitution provides in Article 15, Section 8, that the removal may be for "wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment."

None of the evils to be remedied under the current causes for address are impeachable offenses, in the narrow sense, with the possible exception of oppression in office "which as been defined as a misdemeanor" 1 Russ. Crimes 297, or an act of domination, Baker v. Peck, 36 P2d 404, 406.

The current Texas Constitution provides in Article 1, Section 10, that "...no person shall be held to answer for a criminal offense unless on indictment of the grand jury, except...in cases of impeachment."

The current Texas Constitution in Article 1, Section 10 prohibits the legislature from holding a person to answer for a criminal offense by the process of address.

The current Texas Constitution, Article 15, Section 4, provides "...A party convicted on impeachment shall also be subject to indictment, trial and punishment according to law."

The current Texas Constitution does not provide that a person who has been removed by address shall also be subject to indictment, trial and punishment according to law.

"High crimes and misdemeanors" are sufficient causes for impeachment under the Texas Constitution; "high crimes and misdemeanors" can not be proper causes for address under the Texas Constitution.

Respectfully submitted,

/s/WAGGONER CARR

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ATTORNEYS FOR PLAINTIFF
DONALD B. YARBROUGH

(Verbatim copy of original document as received)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

DONALD B. YARBROUGH,
Plaintiff,
V. | NO. A 77 CA 131

MEMBERS OF THE HOUSE OF
THE HOUSE OF REPRESENTATIVES
AND SENATE OF THE STATE OF
TEXAS; AND DOLPH BRISCOE,
GOVERNOR OF THE STATE OF
TEXAS, AS A GROUP AND
INDIVIDUALLY,
Defendants.

MOTION TO DISMISS

COMES NOW John L. Hill, Attorney General of Texas, on behalf of all duly elected state officials and employees of the State of Texas who have been properly served with process herein, Defendants in the above entitled and numbered cause, and files this their Motion to Dismiss and would respectfully show unto the Court the following:

This Court should dismiss the Complaint for the following reasons:

1. The Court lacks jurisdiction over the subject matter;

2. The well recognized doctrine of abstention requires that this Court abstain from entering relief sought; and

3. Defendants are subject to legislative and/or judicial immunity.

WHEREFORE, PREMISES CONSIDERED, said Defendants pray that the Complaint be dismissed for the foregoing reasons.

RESPONSE TO APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW John L. Hill, Attorney General of Texas, on behalf of all duly elected state officials and employees of the State of Texas who have been properly served with process herein, Defendants in the above entitled and numbered cause, and files this their Response to Application for Temporary Restraining Order and would respectfully show unto the Court the following:

This Court should deny the Application for Temporary Restraining Order because:

1. Plaintiff cannot show a substantial likelihood of prevailing on the merits; and

2. It does not appear from specific facts alleged by the verified complaint that immediate and irreparble injury, loss, or damage will result to the Plaintiff nor has Plaintiff shown nor will Plaintiff be able to show that his constitutional rights have been violated or that he will suffer immediate and irreparable injury, loss or damage.

WHEREFORE, PREMISES CONSIDERED, said Defendants pray that the Application for Temporary Restraining Order be denied for the foregoing reasons.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

LEE C. CLYBURN
Administrative Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711 475-3212

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Defendants' Motion to Dismiss and Response to Application for Temporary Restraining Order was hand delivered to Mr. Waggoner Carr, Suite 305, Stokes Building, 314 West Eleventh Street, Austin, Texas 78701, Attorney for Plaintiff, on the 14th day of July, 1977.

LEE C. CLYBURN
Administrative Assistant Attorney General

(Verbatim copy of original document as received)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD B. YARBROUGH,
Plaintiff,
V. NO. A-77-CA-131

MEMBERS OF THE HOUSE OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS: AND DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AS A GROUP AND INDIVIDUALLY,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW John L. Hill, Attorney General of Texas, on behalf of all duly elected state officials and employees of the State of Texas who have been properly served with process herein, Defendants in the above entitled and numbered cause, and files this their Memorandum in Support of Motion to Dismiss.

I. INTRODUCTION

Plaintiff Donald B. Yarbrough filed this lawsuit shortly before 5:00 p.m. on July 13, 1977. The cause has been set for hearing upon Plaintiff's Motion for Temporary Restraining Order at 1:00 p.m. on July 14, 1977. By this lawsuit, Plaintiff seeks to have this Court restrain the Legislature of the State of Texas from proceeding with hearings that are scheduled to commence at 9:00 a.m. on July 15, 1977. As set out in Plaintiff's court papers herein on file, the stated purpose of such hearing is to consider whether the Legislature of the State of Texas should, pursuant to Article 15, Section 8 of the Texas Constitution, vote to address the Governor of the State of Texas to remove Plaintiff from office as Associate Justice of the Supreme Court of Texas.

It is absolutely crucial to note that neither House of the Legislature of the State of Texas has, as of the date of this Memorandum voted to address the Governor to remove Plaintiff from office. Only certain preliminary and interlocutory steps have been taken by the Legislature. Even more crucial for this Court's purposes is the fact that Plaintiff has made no attempt whatsoever to obtain relief through the Texas State court system. The issue before the Court is, therefore, whether this Court should restrain the Legislature of the State of Texas from proceeding with hearings under provisions of the Texas Constitution before the Legislature has taken any action thereunder and before the Plaintiff has made any attempt whatsoever to present his claims to the Texas Court.

II. THE FEDERAL COURTS HAVE NO JURISDICTION TO ENJOIN THE REMOVAL OF STATE OFFICERS.

In view of the gravity of the subject matter of Plaintiff's lawsuit and of the extraordinary relief he is seeking in this Court, the Defendants are at a loss to explain why the Plaintiff has failed to discuss in any of the papers filed with this Court the unbroken line of the United States Supreme Court cases flatly holding that this Court does not possess the jurisdiction to hear his lawsuit.

As early as 1888, the Supreme Court held that a federal court, sitting in equity, has no jurisdiction over the removal of public officers:

> "(W)hether the (removal) proceedings...are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which (a) Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by by injunction for tribunals and officers of the State...from trying and determining." In re Sawyer, 124 U.S. 200, 210 (1888).

In re Sawyer involved the removal of a municipal officer. A decade later, the Court reaffirmed this principle with respect to the removal of a federal officer, White v. Berry, 171 U.S. 366 (1898), and a state officer, Wilson v. North Carolina, 169 U.S. 586 (1898). In 1924 the Supreme Court considered a case involving removal proceedings by impeachment. The Court's holding in that case is directly applicable to the address proceeding made the basis of Plaintiff's suit. The Plaintiff state officer in Walton v. House of Representatives of the State of Oklahoma, 265 U.S. 487 (1924) brought suit in federal district court to enjoin the prosecution of articles of impeachment, alleging that the articles were prompted by wrongful motives and prejudices and that the senate members who were to sit in judgment were influenced by the same considerations. Though the complaint was founded upon an alleged violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Supreme Court held that the district court's summary dismissal of the action was proper:

> "A court of equity has no jurisdiction over the appointment and removal of public officers, White v. Berry, 171 U.S. 366, and particularly are the courts of the United States sitting as courts of equity without jurisdiction over the appointment and removal of state officers. In re Sawyer, 124 U.S. 200, 210. And see Taylor v. Beckham, 178 U.S. 548, 570. That the removal is through a proceeding in the nature of a criminal prosecution does not alter the rule. In re Sawyer, supra, pp. 210, 219."

Id. at 490.

The above decisions have neither been overruled nor questioned by the United States Supreme Court. In fact, the Court in Baker v. Carr, 369 U.S. 186 (1962) recognized their continuing vitality. In discussing whether the issue of state legislative apportionment was justiciable, the court stated:

> "We have not overlooked such cases as In re Sawyer, 124 U.S. 200, and Walton v. House of Representatives, 265 U.S. 487, which held that federal equity power could not be exercised to enjoin a state proceeding to remove a public officer. But these decisions explicitly reflect only a traditional limit upon equity jurisdiction, and not upon federal courts' power to inquire into matters of state governmental organization. This is clear not only from the opinions in those cases, but also from White v. Berry, 171 U.S. 366, which, relying on Sawyer, withheld federal equity from staying removal of a federal officer. Wilson v. North Carolina, 169 U.S. 586, simply dismissed an appeal

from an unsuccessful suit to upset a State's removal procedure, on the ground that the constitutional claim presented—that a jury trial was necessary if the removal procedure was to comport with due process requirements—was frivolous." Id. at 231. (Emphasis supplied).

The Supreme Court of the United States has spoken unequivocally: Federal Courts do not have jurisdiction to enjoin the Legislature of the State of Texas from proceeding with hearings under Article 15, Section 8, Texas Constitution. This Court should dismiss this lawsuit with prejudice in all respects.

III. SINCE THERE IS AN ONGOING STATE PROCEEDING, THE WELL RECOGNIZED DOCTRINE OF ABSTENTION MANDATES THAT THIS FEDERAL COURT ABSTAIN FROM GRANTING THE RELIEF SOUGHT. FURTHER, ASSUMING ARGUENDO THE COURT TAKES COGNIZANCE OF THE CASE, PLAINTIFF HAS NOT SHOWN NOR IS HE ABLE TO SHOW A GENUINE THREAT AND IRREPARABLE INJURIES SUFFICIENT TO ENTITLE HIM TO THE EXTRAORDINARY REMEDY SOUGHT.

An injunction against the impeachment proceedings will not lie under the holdings of Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, 420 U.S. 592 (1975), Trainor v. Hernandez, 45 L.W. 4535 (May 31, 1977), and Duke v. Texas, 477 F.2d 244 (1973).

In Younger, the Supreme Court considered the propriety of federal court intervention in pending state criminal cases and observed, where injunctive relief is sought against a state prosecution, that

"even irreparable injury (which is a normal prerequisite for an injunction) is insufficient unless it is both 'great and immediate.'" Id., at 46.

And it was particularly noted that:

"the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable'....Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." Id., at 46.

The Court additionally observed that

"the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it,...." Id., at 54.

The Court concluded that for an injunction to issue against a state criminal proceeding,

1. The state statute must be unconstitutional on its face; and
2. There must be a showing of bad faith prosecution and/or harassment by state officers or officials.

In Huffman v. Pursue, supra, the Supreme Court extended the Younger principles to ongoing state civil proceedings that are "akin to criminal cases" (an injunction in aid of the enforcement of Ohio's obscenity law).

The Fifth Circuit has applied the Younger requirements to all state civil actions in Duke v. Texas, supra, and overturned a federal district court's injunction against a state civil proceeding, holding

"As required by the principles of equity, comity, and federalism enunciated by Younger v. Harris, supra, and applied by this Court to state injunctions in aid of state criminal statutes in Palaio v. McAuliffe, supra, the court below should not have entertained this suit, but should have allowed the then active litigation to progress in orderly fashion through the state courts. The district court upon remand is directed to vacate its injunctive decree and dismiss the complaint." Id., at 253.

In the very recent United States Supreme Court case of Trainor v. Hernandez, 45 L.W. 4535 (May 31, 1977), the Court held that considerations of

federalism and comity required the federal district court to stay its hand in a civil suit in which the state as a creditor had obtained writs of attachment under state law. The court held that the principles of Younger and Huffman applied to the case at bar because

> "both the suit and accompanying writ of garnishment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs."

The doctrines of Younger, Huffman, Duke and Trainor are clearly applicable to the address proceedings which Plaintiff seeks to enjoin. The address proceedings are clearly judicial in nature. Atty. Gen. Op. H-1023 (1977).

More important, the philosophy of Younger (and its progeny) demands that its principles be applied to the address process. Younger based its curtailment of federal court injunctions against state actions on federalism and comity observing that "comity"

> "is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,'." Id., at 44.

The Court, in Duke, chidingly stated that in connection with the injunction issued by the lower federal court

> "Such intrusion was improper as disruptive to the delicate balance between federal and state courts implicit in traditional concepts of comity and federalism. As representative of the dominant partner in the necessary interplay between the two sovereigns, federal courts must be especially sensitive to this balance and assiduous in its preservation. These goals were disregarded in this case." Id., at 252.

And the Younger court observed

> "A federal lawsuit to stop a prosecution in a state court is a serious matter." Id., at 42.

How much more "serious," how much more "disruptive," would be an injunction forbidding the Legislature from performing its constitutional duties. Comity and federalism shout for the application of Younger principles to these address proceedings.

Plaintiff is not entitled to the injunction he seeks. Abstension is patently indicated.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

LEE C. CLYBURN
Administrtive Assistant Attorney General

P. O. Box 12548, Capitol Station
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Defendants' Memorandum in Support of Motion to Dismiss was hand delivered to Mr. Waggoner Carr, Suite 305, Stokes Building, 314 West Eleventh Street, Austin, Texas 78701, Attorney for Plaintiff, on this the 14th day of July, 1977.

LEE C. CLYBURN
Administrative Assistant Attorney General

(Verbatim copy of original document as received)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD B. YARBROUGH

VS. Civil Action No. A-77-CA-131

MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATE OF THE STATE OF TEXAS: and DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AS A GROUP AND INDIVIDUALLY

ORDER OF DISMISSAL

I find as a fact that a proceeding by way of address, pursuant to Article XV, Section 8, of the Constitution of the State of Texas, has been commenced and is pending against the plaintiff, Donald B. Yarbrough, with the view of determining whether he should be removed from the office of Associate Justice of the Supreme Court of Texas.

In these circumstances, I conclude that principles of comity require that this Court permit this state proceeding to go forward without interference at this time.

Baker v. Carr, 369 U.S. 186 (1972);
Trainor v. Hernandez, 45 U.S.L.W. 4535, 4537-38 (U.S. May 31, 1977);
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975);
Younger v. Harris, 401 U.S. 37, (1971);
Duke v. Texas, 477 F.2d 244 (5th Cir. 1973);
Ex. Parte Sawyer, 124 U.S. 200 (1888);
Wilson v. N.C., 169 U.S. 586 (1898)
Walton v. House of Representatives of Okla., 265 U.S. 487 (1924).

Especially in point among the above citations are Sawyer and Walton, causes involving state proceedings to remove public officers, the holdings of which appear to have been restated as ones of abstention by the Supreme Court in Baker v. Carr, supra.

For these reasons, the cause is dismissed without prejudice. Because of the shortness of time, no application for a stay or for rehearing will be entertained.

Signed and entered at Austin, Texas, this 14th day of July, 1977.

/s/THOMAS G. GEE
United States District Judge

TEXAS LEGISLATIVE COUNCIL
P.O. Box 12128, Capitol Station
Austin, Texas 78711
Telephone: 512/475-2736

December 5, 1977

ROBERT E. JOHNSON
Executive Director

Senate Journal Clerk
Capitol Building
Austin, Texas 78711

Enclosed are photocopies of pages from the compilation of actions and papers relating to the address of Donald B. Yarbrough which we forwarded to you a few days ago with notations thereon by Waggoner Carr, attorney for Mr. Yarbrough.

Mr. Carr's letter reads in part:

"In reading the pre-hearing conference transcript I note some errors on page 11 and 25. I have reproduced those two pages indicating the errors I have found, with a hope that the permanent record of these proceedings may be corrected thusly.

In reading the address proceedings I note errors on pages 19, 22, 23, 24, 25, 28 and 30. I enclose copies of those pages indicating the errors I have found with the hope that the permanent record may be corrected thusly."

You may want to add this to the compilation.

Sincerely,

Robert E. Johnson

Robert E. Johnson
Executive Director

REJ/pam
Enclosures

11

I don't know. I have an idea that there might be something -- he said I'm on a fishing expedition, or somebody said it over here, he might have something that's exculpatory toward my client, and he's hiding it if he does. And I tell you that if we're going to practice on a 24 hour lawsuit here where that's all the time we have to get going, let's go. We're not playing games. ~~We're~~ You're going after a man's rights. ~~We're~~ You're trying to destroy his future. Whatever ~~we're~~ you're trying to do that's the game that ~~we're~~ you are playing and it's serious.

Now, I don't care if you want to look at it first, look at it. But let's get going, and that's all I can say to you. We're at your mercy. We're at the government's mercy. We don't have any power. We had only power to subpoena 24 hours ago and here we are tonight and nobody's given us anything. I say to you that there are basic rights here, that we ought to quit playing games and let's get going on what's right, and I'll leave it up to you whether we get it or not or where we get it from. We can't be ready 24 hours from now if we don't get the evidence that we have a right to see, and that's your job.

FARABEE: Mr. Carr, while you are standing there -- you referred to "all audio tapes and documents". Could you be any more explicit as to what you are referring to in the way of specific documents and specific audio tapes?

CARR: I haven't seen his file in the first place, but

25

a civil or criminal case in this state, and that is, we would have the undeniable right to question and to explore, in whatever legal way we could, the possible bias or prejudice of the jury. And we are not trying to disqualify anybody per se, but what I am trying to avoid is exactly what I read in the paper the other day, if I might say so, where some of your own members said that a whole bunch of you had already made up your mind; and if that is true, I want to know it, because if a majority or two-thirds of the members of the House and Senate have already decided that Mr. Yarbrough ought to be moved out without ever hearing any evidence, let's not have any hearing Friday. I have got some other things I would like to do like Ronnie Earle. Now I think I have a right, and I propose it here as a part of the motion to have a voir dire, I have a right to examine the jury that is going to decide the fate of Judge Yarbrough, and to determine whether they are prejudiced, biased, have a fixed opinion, or have already convicted him, because my client has a constitutional right to a fair trial, and I keep hearing fair trial, fair trial, here. I don't care what you do for us in the way of procedure or whether you let me have Davis Grant's records, If you still give me a loaded jury and deny me the right to determine whether I have a jury that has already decided in advance adversely to me, you have denied me every essence of a fair trial.

into that, I would be grateful for ~~you~~ your letting me have a personal word. I want to express my appreciation to each one of you and to the Speaker and the Lieutenant Governor for the courtesy and the warm welcome you have given to me today because of my 10-year service in this House and as a former Speaker, you made me feel welcome personally and I want to thank you for that reception.

We are gathered today for a very serious and extraordinary purpose. There has not been a proceeding such as we are beginning at this time in 105 years. Only did the Joint Session of 1874 meet as you are today for a similar purpose. I rise not asking you for delay because of delay. I ask for delay in the name of justice and in the next few moments I shall lay those reasons out. ~~There~~ we think we need some additional time before we are adequately prepared to present to you the defense of Justice Yarbrough in a fashion that any earnest sincere attorney feels he should for any client. I know that you will give my plea serious consideration because I make my plea in the same way. Three days ago we secured for the first time the right to subpoena witnesses in behalf of Justice Yarbrough. You have heard this morning the roll call which shows that the two main witnesses we have subpoenaed are absent. One cannot be found. The other is secreted away somewhere and is not here. Why do

a sack on Mr. Rothkopf's head.

MR. CARR: I agree with that. I don't accuse any of you ladies and gentlemen of doing anything like that and certainly not Senator Adams. Certainly not any of the distinguished gentlemen who are opposing me today. Let me make the record clear on that.

Ladies and gentlemen, if you were an attorney preparing the defense of Justice Yarbrough and ~~you had~~ THERE WERE tapes that were supposedly recorded by Mr. Bill Rothkopf and if he was a party to the allegations that you are going to try Justice Yarbrough, ~~that is~~ OR YOU WOULD HAVE THE RIGHT TO QUESTION ROTHKOPF ~~forging an automobile title~~. He was there. He knows some of the story, but we can't get him. How can we go to trial today without a material witness. We cannot prepare our case and I plead with you in what is fair and what is legal. Please give us the same rights that we would have without question in a courthouse.

(MR. CARR SPEAKING) Certainly the Legislature should do no less than, ~~you have passed the laws for others to abide by~~ (I FELT THE MINIMUM STANDARD OF THE LAWS WAS WHAT PASSED). Now, three days and here we are. In your Resolution you have pled three items, one being that he committed the offense of aggravated perjury; that is already a matter of an indictment in the Travis County Courthouse, and when it comes to trial that will take several days, if not several weeks. In your second paragraph you charged that Justice Yarbrough committed the offense of forgery, that also is the subject of an indictment now resting in the Travis County Courthouse, and when that comes to trial that also should take several days if not several weeks. In addition to that you are charging Justice Yarbrough with planning and soliciting the offense of capital murder.

In other words, you have wrapped up two complete trials that will take weeks and that need days and weeks to prepare, and you have requested that we prepare in three days.

Now, you say, and it is correct, that ten days prior to today we were given a copy of a Resolution; that is correct. But, likewise, it is also correct that we received the right to subpoena our witnesses only three days ago, and it is likewise correct that you passed the rules for these hearings

three days ago -- or it seems like three. Anyway, it was last Monday -- or was it Tuesday? There is no Court in Texas that would require that the defense on major charges be prepared in three days, and I ~~ask~~ [say to] you again that it is our legal right to be given -- our constitutional right to be given sufficient and reasonable time to prepare the defense.

I know you are in a rush, I know you ~~are here because you~~ are away from home, but may I dare suggest that when you start talking about removing one of the high officials of this State, who was legally and duly elected, from his office and destroying his reputation and his livelihood that surely it should touch your hearts that you have some obligation that is paramount and above your convenience. I have only to suggest to you that if that is not important to you, perhaps the reason is that your name is not Yarbrough. If your name ~~is~~ [was] Yarbrough, I can almost guarantee you you would be pleading for a reasonable time, even at your inconvenience, to answer the serious charges which you have brought against him.

As a former member of the House of Representatives, I am interested in the reputation this Legislature has for integrity and reasonableness. I do not desire to participate, if possible, in any ceremony,

any proceeding where you will appear ~~to be~~ To Be to the people of this State in a rush to judgment, where you trumpled and trampled upon the constitutional rights of any citizen of this State, whether he be a Supreme Court Justice or a lowly laborer, whether he be the least among us or the best among us -- and surely we are not asking too much.

PRESIDING OFFICER: The Chair will recognize Mr. Maloney.

MR. MALONEY: Chairman Parabee and Chairman Hale, Members of the Committee for the Senate and Members of the Committee for the House, I rise to oppose Mr. Carr's Motion for a Postponement on the basis that these charges were presented to Justice Yarbrough ten days ago. In response to a Motion for Discovery filed by Mr. Carr on Justice Yarbrough's behalf, we provided those items that he had asked for, and he has them in his possession and has had them since they were turned over to him.

I believe that this case is ready to go to trial at this time, that this hearing can continue, and we are ready to proceed.

But, I would point out something that gives me great concern; if you voted affirmatively on Mr. Carr's Motion for a Postponement it is an indefinite

MR. CARR: Gentlemen and ladies, I'm not going to take but a few moments, but I do think, in justice, to correct some of the statements that my good friend Representative Maloney said.

First of all, he said that we have had the records since they gave them to us. I cannot deny that. That is a rather SELF proving statement. The only thing I would like to say is this: When did they get them to us? The first records we received ~~were~~ ON Tuesday night about 11:00 o'clock. We have NOT completed some that they promised us last night-- last night. The records that we have on the tapes are copies. The originals have not been given to us. Those copies, as any lawyer knows, must be compared with the originals to be sure they have not been doctored in some way. That is our right, and you attorneys would demand the same right. Now, he says that we would be bound by Mr. Rothkopf's testimony. I beg respect~~fully~~ FULLY to take issue with that for the simple reason that there is, of course, as we all know, a procedure in our Texas Jurisprudence where you can call a witness as an adverse witness, and I would intend to do that because I do not have the impression that Mr. Rothkopf is a friend, and I would not be bound by his testimony. I intend to attack him and to attack his credibility because you, sitting as a Juror, and that's

because of illness or secreting or hiding. That's all. And when they come out of hiding, or they get well, we will be ready. So Monday will not help us unless these "miracles" occur. So I renew-- In the name of fairness, I request that you not trample over the dead body of the constitutional rights of a citizen of this State in order to rush to judgment. Give us a chance. Be fair. We, in return, will put up the defense of Justice Yarbrough, which is so vital to him and would be vital to you if you were in his shoes.

PRESIDING OFFICER: All right. For the benefit of the joint meeting, let me read to you the Motion to Postpone which states as follows:

"On this the 12th day of July, 1977, the counsel for Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas, without waiver of any right, or privilege of the said Donald B. Yarbrough, respectfully represents to the Honorable Legislature that due and proper preparation of and for the hearing will require, in the opinion and judgment of such counsel, that a period of not less than thirty (30) days should be allowed to the Associate Justice of the Supreme Court of Texas and his counsel for such preparation and before the said hearing should proceed."

In addition, and contained therein,